No. 06-637
Title: Board of Education of the City School District of the City of New York, Petitioner
v.
Tom F., on Behalf of Gilbert F., a Minor Child
Docketed: November 7, 2006
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (05-0566)
Decision Date: August 9, 2006
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Nov 3 2006	Petition for a writ of certiorari filed. (Response due December 7, 2006)
Nov 13 2006	Order extending time to file response to petition to and including January 8, 2007.
Jan 8 2007	Brief of respondent Tom F., on Behalf of Gilbert F., a Minor in opposition filed.
Jan 24 2007	DISTRIBUTED for Conference of February 16, 2007.
Feb 20 2007	DISTRIBUTED for Conference of February 23, 2007.
Feb 26 2007	Petition GRANTED.
Mar 22 2007	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 14, 2007.
Apr 27 2007	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
May 2 2007	Consent to the filing of amicus briefs in support of either/neither party received from counsel for the respondent.
May 2 2007	Consent to the filing of amicus briefs received from counsel for the respondent
May 11 2007	Joint appendix filed.
May 11 2007	Brief of petitioner Board of Education of the City School District of the City of New York filed.
May 14 2007	Brief amici curiae of National School Boards Association, et al. filed.
May 14 2007	Brief amicus curiae of New York State School Boards Association filed.
May 14 2007	Brief amici curiae of U.S. Conference of Mayors, et al. filed.
May 14 2007	Brief amici curiae of Council of the Great City Schools, et al. filed.
Jun 6 2007	The time within which to file respondent's brief on the merits is extended to and including July 18, 2007.
Jul 18 2007	Brief amici curiae of International Dyslexia Association, Inc., et al. filed.
Jul 18 2007	Brief amicus curiae of Autism Speaks filed.
Jul 18 2007	Brief of respondent Tom F., on Behalf of Gilbert F., a Minor Child filed.
Jul 18 2007	Brief amici curiae of Council of Parent Attorneys and Advocates, et al. filed.
Jul 18 2007	Brief amici curiae of National Disability Rights Network, et al. filed.
Jul 18 2007	Brief amicus curiae of United States filed.
Jul 18 2007	Brief amicus curiae of Agudath Israel of America filed.
Jul 19 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. (Distributed)
Aug 8 2007	CIRCULATED.
Aug 14 2007	SET FOR ARGUMENT Monday, October 1, 2007.

Aug 16 2007	Reply of petitioner Board of Education of the City School District of the City of New York filed. (Distributed)
Aug 20 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Aug 29 2007	Record received from U.S.C.A. for 2nd Circuit. (1 box)
Aug 30 2007	Record received from U..D.C. for Southern District of New York. (1 box)
Sep 19 2007	Justice Kennedy is recused in this case.
Oct 10 2007	Adjudged to be AFFIRMED by an equally divided Court. Justice Kennedy took no part in the decision of this case. Opinion per curiam.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 06-

IN THE
SUPREME COURT OF THE UNITED STATES

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

-against-

TOM F., on behalf of GILBERT F., a minor child,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November 1, 2006

QUESTION PRESENTED

Does the holding of the United States Court of Appeals for the Second Circuit, stating that the Individuals with Disabilities Education Act permits tuition reimbursement where a child has not previously received special education from a public agency, stand in direct contradiction to the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) which authorizes tuition reimbursement to the parents of a disabled child "who previously received special education and related services under the authority of a public agency"?

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BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

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-against-

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The summary order of the United States Court of Appeals for the Second Circuit from which petitioner Board of Education of the City of New York ("Board" or "petitioner")[1] seeks certiorari, was issued on August 9, 2006. The order was not reported but may be accessed at 2006 U.S. App. LEXIS 209611 and appears in the

[1] The former Board of Education is presently known as the Department of Education.

Appendix at p. 14. The summary order vacated and remanded for further proceedings the judgment of the District Court in light of the Second Circuit's decision in *Frank G. v. Bd. Of Education*, No. 04-4981, 2006 U.S. App. LEXIS 19029.

The Second Circuit's August 9, 2006 order followed an appeal from an opinion and order of the United States District Court for the Southern District of New York (Daniels, U.S.D.J.), filed January 4, 2005, which granted as a matter of law the summary judgment motion of plaintiff-appellee Board dated March 25, 2002, and dismissed all of the claims of respondent Tom F. The District Court order appears in the Appendix at p. 1.

A grant of certiorari in this case would also bring up for review the Second Circuit's opinion and order (one paper) of July 27, 2006, in the matter of *Frank G. v. Bd. Of Education*, No. 04-4981, 2006 U.S. App. LEXIS 19029 which held, *inter alia*, that the Individuals with Disabilities Education Act permits tuition reimbursement under circumstances where the child has not previously received special education from a public agency. That order affirmed a judgment of the United States District Court for the Southern District of New York which ordered the defendant Board of Education of Hyde Park, Central School District ("Hyde Park") to reimburse plaintiffs Frank G. and Dianne G., parents of a disabled student Anthony G., for tuition where the private school selected by the parents was found to be appropriate under the IDEA. In that matter, petitioner Hyde Park has also sought certiorari.

JURISDICTION

The Second Circuit issued the summary order from which the City seeks certiorari on August 9, 2006. No petition for rehearing was filed in this case. This Court has jurisdiction to review this summary order under 28 U.S.C. §1254.

STATUTORY PROVISION

The relevant provision of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*., which is contained in § 1412(a)(10)(C)(ii),[2] states as follows:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school, without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment (emphasis supplied).

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[2] See Appendix at p. 16.

SUMMARY OF THE ARGUMENT

Petitioner takes the position that 20 U.S.C. § 1412(a)(10)(C)(ii) unambiguously precludes tuition reimbursement in situations where the public agency has made a free appropriate public education available to a student with a disability and where the parent has unilaterally enrolled the student in private school without first trying the public school special educational placement.

STATEMENT OF THE CASE

A. Nature Of The Case.

Petitioner filed an action in the Southern District of New York under the IDEA, seeking to overturn local and state administrative determinations that petitioner was required to reimburse respondent the cost of his son's private school tuition. The District Court reversed the administrative determinations on the ground that reimbursement was barred by 20 U.S.C. § 1412(a)(10)(C)(ii).

On appeal, the Second Circuit vacated the District Court's judgment and remanded the matter for further proceedings in light of its decision in *Frank G. v. Bd. Of Educ.*, No. 04-4981, __ F.3d __, 2006 WL 2077009, 2006 U.S. App. LEXIS 19029 (July 27, 2006) that the reimbursement of tuition in that case was not barred by 20 U.S.C. § 1412(a)(10)(C)(ii).

B. Statement Of Relevant Facts.

1. Overview of the IDEA

The IDEA was enacted by Congress to assure that all children with disabilities have available to them a free appropriate public education ("FAPE") which emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(c).

The City School District of the City of New York ("District") is a public school district duly organized, existing and operating consistent with the Education Law of the State of New York. *See* N.Y. Educ. Law § 1804 (McKinney Supp. 2005). Under the IDEA, the District is a "local educational agency," *see* 20 U.S.C. § 1401(15)(A), responsible for the identification and evaluation of children with disabilities residing within its territorial boundaries. *See* 20 U.S.C. § 1412(a)(3)(A).

Upon identification, the District bears the responsibility of providing resident children between the ages of three and twenty-one with a "free appropriate public education." *See* 20 U.S.C. § 1412(a)(1)(A).

A free appropriate public education is designed through the collaboration of the parents and teachers of the disabled child, and the school district administrators, and is recorded in an individualized education program ("IEP"). *See* 20 U.S.C. § 1414(d). The IEP is a comprehensive statement of the educational needs of the disabled child and the specially designed instruction and related services to be used to meet the child's needs. In New York State, the IEP is produced by a Committee on Special Education. The members of the Committee on Special Education are appointed by the board of education or trustees of the school district. *See* N.Y. Educ. Law § 4402(1)(b)(1) (McKinney Supp. 2005).

To accomplish its goals, "the IDEA requires that states [receiving certain federal funds] offer parents of a disabled child an array of procedural safeguards designed to help ensure the education of their child." *Polera v. Board of Education of the Newburgh Enlarged City School District*, 288 F.3d 478, 482 (2d Cir. 2002). Under the IDEA, a parent may "present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). "[P]arents involved in such complaint shall have an opportunity for an impartial due process hearing." 20 U.S.C. §1415(f)(1). Under New York State law, the due process hearing is conducted by a hearing officer who is appointed by the local board of education. *See* N.Y. Educ. Law § 4404(1) (McKinney Supp. 2005).

Generally, "no private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.454(a). The IDEA provides that the local school district is not required to pay for the cost of education of a child with a disability at a private school or facility if the agency made a free appropriate public education available to the child and the parent elected to place the child in such private school or facility. *See* 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.403.

Except under limited circumstances, the IDEA does not require school districts to pay for tuition at private schools. *See Greenland School District v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004). This Court has instructed that when a parent unilaterally withdraws the child from the public school and seeks tuition reimbursement for the child's private placement, the parent does so at his or her

own peril. *See School Comm. Of Burlington v. Department of Educ.*, 471 U.S. 359, 373-374 (1985).

2. Local and State Administrative Proceedings in the Instant Case

Tom F. ("respondent") is the parent of a child, Gilbert F. ("student"), who resides in the Board's School District. The student was born on October 1, 1989, and has never received special education services from the Board or any other public agency. Since the time that the student was eligible to receive public education in 1995, the student has attended a private school that is unapproved by the Commissioner of Education of the State of New York for the provision of special education services to students with disabilities (A1).[3]

On June 23, 1999, the Board's Committee on Special Education ("CSE") conducted an annual evaluation to determine the student's appropriate educational placement for the 1999-2000 school year. After reviewing several evaluations conducted by the CSE in preparation for the student's annual report, the CSE recommended that the student continue to be classified as learning disabled and be placed in a Modified Instructional Services – I ("MIS-I") program with a teacher ratio of 15:1. The student's Final Notice of Recommendation, recommending the student's placement at P.S. 871, known as the New York City Lower Lab School for Gifted Education, was sent to respondent parent on July 29, 1999 (A1-3).

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[3] Unless otherwise indicated, numbers in parentheses preceded by the letter "A" refer to page numbers of the Appendix.

Respondent never visited the school, never met with any representatives from the school, and never met with the placement officer at the CSE. Respondent acknowledged that he has never visited any public school placement that the CSE has offered the student in the past. Respondent further admitted that he had already decided to again enroll the student in private school and had tendered a down payment to that school.

Although the Board made a free appropriate public education available to the student, respondent parent rejected the placement and chose to continue the student's private school placement for the 1999-2000 school year. Respondent thereafter brought an administrative hearing against the Board and requested an impartial hearing seeking tuition reimbursement for his unilateral placement of the student in private school for the 1999-2000 year (A3).

On April 6, 2001, the Impartial Hearing Officer ("IHO") issued his Findings of Fact and Decision, and found that the Board did not meet its burden of showing that its recommendation was appropriate. The IHO also determined that the private school provided an appropriate program for the student and ordered the Board to reimburse Appellant for the cost of the student's private school tuition. The Board appealed the IHO's decision to the State Education Department State Review Officer ("SRO"), arguing that pursuant to the IDEA, tuition reimbursement was limited to parents of a child with a disability, who previously received special education and related services under the authority of a public agency (A3).

The SRO issued a decision granting respondent's request for tuition reimbursement and dismissing the Board's appeal on March 30, 2001. In doing so, the SRO determined, *inter alia*, that the Board failed to demonstrate that its recommended placement was appropriate. The

SRO also concluded that the CSE was improperly constituted and consequently resulted in an inappropriate placement (A3).

C. The Complaint.

On July 26, 2001, the Board filed a complaint in the instant action, challenging the SRO's decision which granted appellant's tuition reimbursement for the 1999-2000 school year. The complaint asserted one claim, seeking redress for an award of full-tuition reimbursement for the 1999-2000 school year, reversal of the March 30, 2001 decision of the SRO finding that the Board failed to demonstrate that there was a validly composed CSE at the June 23, 1999 meeting and also finding that equities required reimbursing the parent for full tuition because the parent cooperated with the CSE.

D. Motion And Cross-Motion For Summary Judgment.

By notice of motion dated March 25, 2002, the Board moved for a summary judgment order granting the relief sought in the amended complaint.

By notice of cross-motion dated May 6, 2002, the respondent moved for summary judgment in its favor.

E. District Court's Order Granting Summary Judgment To The Board.

On January 3, 2005, Judge Daniels issued a memorandum and order (one paper) granting summary judgment in favor of plaintiff and dismissing all of respondent's claims. In those rulings, he granted the

Board's motion for judgment as a matter of law, finding that

> "Interpretation of this provision is an issue of first-impression in this circuit. The clear implication of the plain language, however, is that where a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from a parent's unilateral placement of the child in private school (emphasis in original)."

The District Court also noted that respondent "advocates departure from the plain language of the statute on grounds that adhering to its literal interpretation would defeat the statute's very purpose. This contention is without merit." The District Court also determined that

> "[a]s [the Board] suggests, the provision ensures that a parent's rejection of a public school placement is not based on mere speculation as to whether the recommended public school placement would have been inappropriate. Therefore, it cannot be said that adherence to the plain language would defeat the purpose of the IDEA to provide every child with a disability a free and appropriate public education (citation omitted)."

F. The Decision Of The United States Court Of Appeals For The Second Circuit.

In an unreported summary order dated August 9, 2006, the Court of Appeals for the Second Circuit reversed the District Court order (A14). *Board of Education of the City School District of the City of New York v. Tom F. on behalf of Gilbert F., a minor child*, 2006 U.S. App. LEXIS 20961 (2nd Cir. 2006). The Second Circuit's summary order stated that:

> Upon due consideration, it is hereby ordered, adjudged and decreed that the judgment of district court be, and it hereby is, vacated and remanded for further proceedings in light of this Court's decision in Frank G. v. Bd. Of Educ., No. 04-4981, __ F.3d __, 2006 WL 2077009, 2006 U.S. App. LEXIS 19029 (July 27, 2006).

REASONS FOR GRANTING THE PETITION

This petition raises a compelling question of vital importance to parents, children, and local and state school districts nationwide, regarding whether tuition reimbursement is available under the IDEA to the parent of a child who has never previously received special education and related services from a public agency and who unilaterally enrolled the child in private school.

The Second Circuit's conclusion that tuition reimbursement is available under the IDEA to the parent of a child who has never previously received special education and related services from a public agency is untenable for the following reasons:

(1) the Second Circuit Court of Appeals has entered a decision in conflict with relevant decisions of other federal courts, including the decision of the First Circuit Court of Appeals which interpreted the same statute and addressed the same important issue; and

(2) the Second Circuit's decision conflicts with the clear and unambiguous plain language of 20 U.S.C. § 1412(a)(10)(C)(ii), which limits the availability of tuition reimbursement to situations where the student has previously received special education and related services from a public agency; and

(3) the Second Circuit's decision also conflicts with a recent decision of this Court in *Arlington v. Murphy*, __ U.S. __, 126 S. Ct. 2455, 2463 (2006).

A. The Second Circuit's Holding That 20 U.S.C. § 1412(a)(10)(C)(ii) Does Not Preclude Tuition Reimbursement Where The Student Has Not Previously Received Special Education And Related Services From A Public Agency.

In its decision of August 9, 2006, the Second Circuit vacated the judgment of the district court and remanded the matter for further proceedings in light of its decision in *Frank G. v. Board of Education of Hyde Park*, No. 04-4981, ___ F.3d ___, 2006 WL 2077009, 2006 U.S. App. LEXIS 19029 (July 27, 2006). *Frank G.* held, in relevant part, that

> "[t]he plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) does not say that tuition reimbursement is only available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents whose child had not previously received special education and related services (emphasis in original)."

The Second Circuit, reasoning that the statutory language was ambiguous, resorted to rules of statutory construction for the stated reason of avoiding what it viewed as an absurd result. The Second Circuit looked to the "primary purpose" of the statute and focused upon the "broader context" of the statute, and found that the issue involved an ambiguity created by different sections of the IDEA instead of the interpretation of an ambiguous word or phrase.

Having applied rules of statutory construction, the Second Circuit noted that the purpose of the IDEA is to

ensure the availability of a free appropriate public education to all children with disabilities. Relying upon 20 U.S.C. § 1412(i)(2)(C), the Second Circuit noted further that the statute's purpose is accomplished by the conferring of broad discretion on the district court to grant relief it deems appropriate to parents of disabled children who unilaterally place the children in private school where the private placement is determined to be proper and the proposed IEP is determined to be inadequate. Finally, the Second Circuit found that the Hyde Park School District's interpretation of 20 U.S.C. § 1412 (a)(10)(C)(ii) would produce the absurd result of placing the parents of children with disabilities in the position of acquiescing to an inappropriate placement in order to preserve their right to seek reimbursement from the public agency that devised the inappropriate placement.

The Second Circuit also found that its interpretation was consistent with the interpretation found in an informal letter issued by the United States Department of Education's Office of Special Education and Rehabilitative Services.

We vigorously dispute the conclusion that the plain language of the statute permits tuition reimbursement to the parent of a child who has never previously received special education and related services from a public agency.

Proper respect for the legislative powers vested in Congress implies that statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. *United States v. Albertini*, 472 U.S. 675, 680 (1985). Congress could have made explicit in the statutory language of the IDEA that tuition reimbursement would be available to the parent of a child who has never previously received special

education and related services from a public agency, but Congress did not do so.

20 U.S.C. § 1412 (a)(10)(C)(ii) was added to the IDEA as part of the 1997 amendments. The Second Circuit's interpretation of 20 U.S.C. § 1412 (a)(10)(C)(ii) renders the language "previously received special education and related services" a nullity, and, consequently, the decision conflicts with the rule of statutory construction which requires that interpretations of statutes that render statutory language superfluous are to be disfavored. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992) (courts must presume that a legislature says in a statute what it means and means in a statute what it says there).

B. Conflict With The Court of Appeals For The First Circuit.

One of the major reasons that certiorari should be granted on the question presented to this Court is that the Second Circuit openly disagrees with the analysis of the First Circuit in *Greenland School District v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004). The Second Circuit in this case has gone beyond the plain language of the 1997 amendments to the IDEA, which provides, in pertinent part:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school, without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment

> if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii).

The holding of the Second Circuit in *Frank G.* that a parent whose child has not previously received special education or related services from a public entity, and who unilaterally placed the child in private school, may be reimbursed for private school tuition where the public entity has provided a free appropriate public education is in direct conflict with the holding of the First Circuit, which held that the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) creates a threshold requirement that tuition reimbursement is only available for children who have previously received special education and related services while in the public school system. *See Greenland School District v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004).

It appears that the Court of Appeals for the Eleventh Circuit agrees, at least in part, with the Second Circuit's analysis. In *M.M. ex rel C.M. v. School Board of Miami-Dade County*, 437 F3d 1085, 1098-99 (11th Cir. 2006), the Eleventh Circuit found that the child previously received auditory-verbal therapy and other special education services under the authority of a public agency, but also held that the school board's interpretation of 20 U.S.C. § 1412(a)(10)(C)(ii) would bar children from receiving a FAPE because their disabilities were detected before they reached school age and would additionally place the parents of such children in the position of acquiescing to an inappropriate placement in order to preserve their right to placement.

In order to avoid certain confusion in the Second Circuit and throughout the Circuits, this Court must clarify for litigants in IDEA actions whether or not tuition reimbursement is available to parents whose children have not previously received special education and related services from the public agency under circumstances where said parents unilaterally place their children in private school although the public agency has made available a free appropriate public education.

We submit that the clear meaning of the plain language of the statute is that where a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from the parent's unilateral placement of the child in private school. The Second Circuit decision sets a precedent in that it enables the parent of a child who has never previously received special education from a public agency to receive tuition reimbursement where the parent has unilaterally enrolled the child in a private elementary or secondary school, without the consent of or referral by the public agency. The IDEA contains no explicit statutory authority for tuition reimbursement under the factual situation presented here.

The practical effect of the Second Circuit holding that the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) does not say that tuition reimbursement is only available to parents whose child had previously received special education and related services from a public agency creates unnecessary confusion among public school districts as well as parents of children who need special education and related services. Accordingly, the determination as to whether the Second Circuit has correctly interpreted the statute is significantly consequential in this case.

C. Conflict With The Policy Considerations Underlying The IDEA's Enactment.

Public policy does not require that the parents of children who require special education and related services be reimbursed for unilaterally placing those children in private school when the public agency has provided a free appropriate public education.

The 1997 amendments to the IDEA reinforced the principle that children should not be unnecessarily removed from regular educational environments. 20 U.S.C. § 1412(a)(5)(A). This was accomplished, in part, by the elimination of "inappropriate financial incentives for referring children to special education." H.R. Rep. 105-95, at 90 (1997), reprinted in 1997 U.S.C.C.A.N. 78, 87. It may not be disputed that one specific purpose of the 1997 amendments was to control government expenditures for students voluntarily placed in private schools by their parents. *Id.* at 91-92.

The 1997 amendments added a section to the IDEA entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency." 20 U.S.C. § 1412(a)(10)(C). See H.R. Rep. 105-95, at 93, reprinted in 1997 U.S.C.C.A.N. 78, 90. 20 U.S.C. § 1412(a)(10)(C) begins with a policy statement which explains that the IDEA does not "require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. § 1412(a)(10)(C)(i).

D. Conflict With This Court's Decision In *Arlington v. Murphy*.

The Second Circuit, in interpreting 20 U.S.C. § 1412(a)(10)(C)(ii), left unmentioned that the IDEA was enacted by Congress pursuant to the Spending Clause. U.S. Const., Art. I, § 8, cl. 1. *See Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). In *Schaffer v. Weast*, this Court noted that the IDEA is a Spending Clause statute that seek to ensure that all children with disabilities have available to them a free appropriate public education. The IDEA provides federal funds to assist state and local agencies in the education of children with disabilities, and the IDEA conditions that funding upon the state's compliance with goals and procedures. This Court has recently noted that when Congress attaches conditions to a state's acceptance of federal funds, those conditions must be unambiguously set out. *Arlington Central School District Board of Education v. Murphy*, __ U.S. __, 126 S. Ct. 2455 (2006). In the instant case, the Second Circuit's decision is inconsistent with this Court's decision in *Arlington*.

In sum, we respectfully request that this Court grant certiorari to address the question of whether 20 U.S.C. § 1412(a)(10)(C)(ii) requires that a child must have previously received special education and related services from the public agency in order to be eligible for tuition reimbursement where the parent has unilaterally placed the child in private school and where the public agency has made a free appropriate public education available to the child. The Second Circuit's view of the application of 20 U.S.C. § 1412(a)(10)(C)(ii) is in clear conflict with the plain language of the statute as well as with the view of other Circuit precedent.

CONCLUSION

For the reasons set forth, the City respectfully asks this Court to grant its petition for a writ of certiorari.

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November 1, 2006

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Plaintiff,

01 Civ. 6845 (GBD)

-against-

TOM F., on behalf of GILBERT F., a minor child

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on cross-motions for summary judgment as to the State Education Department State Review Officer's (SRO) award of tuition reimbursement to Defendant. For the reasons set forth below, Plaintiff's motion for summary judgment reversing the award is granted, and Defendant's motion is denied.

I. Background

Many facts are undisputed. Defendant's son,

Gilbert F. ("student") has attended the Stephen Gaynor School ("Gaynor"), a private school, since kindergarten. On June 23, 1999, the Board of Education's Committee on Special Education ("CSE") conducted an annual review to determine the student's appropriate educational placement for the 1999-2000 school year. Seven people attended the CSE meeting, including an educational evaluator who signed the Individualized Education Program (IEP) as the special education teacher. The student's actual special education teacher from Gaynor was unavailable because she was in the hospital.

Following a review of several evaluations conducted by the CSE in preparation for the student's annual report, the CSE recommended that the student continue to be classified as learning disabled and that he be placed in a Modified Instructional Services- I ("MIS-I") program with a teacher ratio of 15:1. The CSE further recommended that the student receive speech/language therapy in a group twice per week and counseling in a

group once per week. The student's Final Notice of Recommendation was sent to Defendant on July 29, 1999, which placed the student at P.S. 871, a public school.

Nonetheless, Defendant continued the student's placement at Gaynor for the 1999-2000 school year and requested an impartial hearing to seek reimbursement for the cost of the student's tuition. On April 6, 2000, the Impartial Hearing Officer ("IHO") ordered the Board to reimburse Defendant for the cost of the student's tuition at Gaynor. The plaintiff, in turn, appealed to the State Education Department SRO, who affirmed the IHO's award of tuition reimbursement on grounds that the CSE was not validly constituted and, thus, resulted in an inappropriate placement.

Plaintiff now seeks to reverse the March 30, 2001 decision of the SRO granting Defendant tuition reimbursement on grounds that: (1) the IDEA precludes an award of tuition reimbursement in instances where a student has not previously received special education

services from a public agency; and (2) in any event, the CSE was properly constituted.

II. Discussion

A. Standard of Review

"Federal courts assess IDEA petitions based on the 'preponderance of the evidence developed at the administrative proceedings and any further evidence presented by the parties.'" M.S. v. Bd. of Educ., 231 F.3d 96, 102 (2d Cir. 2000) (quoting Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 122-23 (2d Cir. 1998). However, this assessment is not an "invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982). When reviewing whether a proposed IEP is appropriate, the district court must give "due weight" to the findings of a state administrative proceeding. Id.

"[The Second Circuit] has acknowledged that 'Rowley requires that federal courts defer to the final

decision of state authorities.'" Muller v. Comm. on Special Educ., 145 F.3d 95, 102 (2d Cir. 1998) (quoting Karl v. Bd. of Educ., 736 F.2d 873, 877 (2d Cir. 1984). "[D]eference is owed to state and local agencies having expertise in the formulation of educational programs for the handicapped." Muller, 145 F.3d at 103 (quoting Briggs v. Bd. of Educ., 882 F.2d 688, 693 (2d Cir. 1989)).

Nonetheless, as Defendant acknowledges here, the Second Circuit has differentiated between those matters where the court has been called upon to judge whether a child has been offered a free and appropriate education, and matters of statutory interpretation. The line of cases that calls for deference to administrative proceedings addresses only the former situation. In contrast, where the issue facing the court is one of statutory interpretation, the district court may review the matter de novo. See Muller, 145 F.3d at 103 (approving of district court's de novo review of whether a school district appropriately classified a child's disability status because

resolution of the issue involved interpretation of the IDEA and applicable regulations). Under the latter circumstances, "state administrative officials [are] in no better position than the district court to make conclusions." Id.

Here, as in Muller, it is not the underlying facts that are in dispute, but rather the legal conclusions to be drawn from those facts. As a result, the concern that motivated the court in Rowley, of courts substituting their own notions of sound educational policy for those of school authorities, is not present. See Rowley, 458 U.S. at 206. As the issues here are ones of statutory interpretation, the SRO's determinations are to be reviewed de novo.

B. Defendant's Eligibility for Tuition Reimbursement

The Board of Education argues that Defendant is barred from tuition reimbursement under the IDEA because his child did not previously receive special education under the authority of a public agency. Defendant argues that despite the plain language of the statute to the contrary, he should be permitted to receive

tuition reimbursement because to hold otherwise would defeat the purpose of the IDEA.

In School Committee of Burlington v. Department of Education, the Supreme Court set forth the circumstances under which a parent who unilaterally enrolled a child in a private school could receive tuition reimbursement. 471 U.S. 359, 369-70. The Court did not limit the remedy to parents of children who previously received special education in a public school. However, Burlington predated the amendments to the IDEA made in 1997.

> The 1997 amendments to the IDEA provide, in pertinent part:
>
> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school, without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to

> the child in a timely manner prior to that enrollment. (emphasis added).[1]

20 U.S.C. § 1412(a)(l0)(C).

Interpretation of this provision is an issue of first impression in this circuit. The clear implication of the plain language, however, is that where a child has *not* previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from a parent's unilateral placement of the child in private school.

The Court of Appeals for the First Circuit reached this conclusion in Greenland School District v. Amy N. 358 F.3d 150, 158-160 (2004). There, the parents of a child who had never received special education services in public school sought tuition reimbursement after having unilaterally removed the child from public school and placed her in private school. As in the instant case, the hearing officer ordered the school district to reimburse the

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[1] This language is reiterated in the applicable federal regulation. 34 C.F.R. §3000.403(c).

child's tuition. However, in affirming the district court's reversal of the hearing officer's holding, the Court of Appeals concluded that the amended provision limits tuition reimbursement to children "who have previously received 'special education and related services' while in the public school system (or perhaps those who at least timely requested such services while the child is in public school)." Id. at 159-160.

As neither threshold is satisfied here, the SRO's holding awarding tuition reimbursement to Defendant was erroneous.

Defendant advocates departure from the plain language of the statute on grounds that adhering to its literal interpretation would defeat the statute's very purpose. This contention is without merit. "Only the most extraordinary showing of a contrary intention from the legislative history would justify interpretive departure from a statute's plain language." O'Connell v. Hove, 22 F.3d 463, 470 (2d Cir. 1994). Here, however, evidence of

congressional intent from the legislative history is *consistent* with the plain meaning of the text. The relevant House Report from the Committee on Education and the Workforce states:

> Section 612 [20 U.S.C. § 1412] also specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). Previously, the child must have had received special education and related services under the authority of a public agency.

House Report No. 105-95 (emphasis added).

As Plaintiff suggests, the provision ensures that a parent's rejection of a public school placement is not based on mere speculation as to whether the recommended public school placement would have been inappropriate. Therefore, it cannot be said that adherence to the plain language would defeat the purpose of the IDEA to provide

every child with a disability a free and appropriate public education. See 20 U.S.C. § 1400(d)(1)(A).

Finally, Defendant relies on an opinion given by the Office of Special Education Programs ("OSEP") in response to the question of whether the 1997 Amendments to the IDEA preclude private school tuition reimbursement for children who had not previously received special education from a public agency. OSEP concluded that it did "not appear that [this] question ... [was] answered by § 612(a)(10)(C) of IDEA '97." Letter to Luger, 33 I.D.E.L.R. 126 (March 19, 1999).

"[D]eference to an OSEP policy letter may be appropriate where statutory language is ambiguous." St. Johnsbury Acad. v. D.H., 240 F.3d 163, 171 (2d Cir. 2001) (quoting Honig v. Doe, 484 U.S. 305, 325 n.8 (1988); However, "if the intent of Congress is clear," a court reviewing an agency's construction of a statute that it administers "must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A. Inc. v.

Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Here, where there is no ambiguity in the statutory language, deference to the OSEP letter would be inappropriate. Therefore, this Court reaches the same conclusion as to the meaning of 20 U.S.C. § 1412(a)(10)(C) that the First Circuit reached in Amy N. See 358 F.3d at 158-160.

As the IDEA bars tuition reimbursement in the instant case, it is not necessary for the Court to address the issue of whether the educational evaluator properly served as the child's special education teacher such that the CSE was validly constituted.[2]

III. Conclusion

For the reasons set forth above, Plaintiff's motion for summary judgment reversing the SRO's grant of tuition reimbursement to Defendant is granted, and

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[2] The Declaration of Linda Wernikoff in Support of Plaintiff's Motion for Summary Judgment addressed issues pertinent only to this latter question. Therefore, Defendant's motion to strike the Declaration as improper is rendered moot.

Defendant's motion is denied. The Clerk is directed to close this case.

SO ORDERED.

Dated: New York, New York
January 3, 2005

U.S.D.J.
Hon. George B. Daniels

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 9th day of August, two thousand and six.

PRESENT

HON. AMALYA L. KEARSE,
HON. ROBERT D. SACK,
Circuit Judges,
HON. TIMOTHY C. STANCEU,*
Judge.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,
Plaintiff-Appellee,

v No. 05-0566

TOM F. on behalf of GILBERT F., a minor child,
Defendant-Appellant.

---

* Of the United States Court of International Trade, sitting by designation.

Appearing for Appellant: Paul G. Gardephe, Patterson, Belknap, Webb & Tyler LLP (Alexis Gander, of counsel), New York, NY.

Appearing for Appellee: Michael A. Cardozo, Corporation Counsel of the City of New York (Edward F.X. Hart, Drake A. Colley, of counsel), New York, NY.

Appeal from the United States District Court for the Southern District of New York (George B. Daniels, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of district court be, and it hereby is, VACATED and REMANDED for further proceedings in light of this Court's decision in Frank G. v. Board of Education of Hyde Park, No. 04-4981, --- F.3d ---, 2006 WL 2077009, 2006 U.S. App. LEXIS 19029 (July 27, 2006).

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

By: _____

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

Supreme Court, U.S.
FILED
JAN 8 - 2007
OFFICE OF THE CLERK

No. 06-637

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F., on behalf of GILBERT F., a minor,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the 1997 Amendments to the Individuals with Disabilities Education Act ("IDEA") created a categorical bar excluding children who have not previously attended a public school, and whose public school districts have failed to provide them with a free and appropriate public education, from receiving the long-established tuition-reimbursement remedy created by the IDEA and this Court's decisions in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) ("*Carter*") and *School Committee of Burlington, Mass v. Department of Education*, 471 U.S. 359 (1985) ("*Burlington*").

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COUNTER-STATEMENT OF THE CASE

Petitioner, the Board of Education of the City School District of the City of New York (the "Board"), asks this Court to exercise its certiorari jurisdiction to consider, and ultimately to overturn, a Summary Order issued by the United States Court of Appeals for the Second Circuit.

As an initial matter, this case provides no basis for this Court's review. Summary Orders are without precedential value in the Second Circuit. *See* Second Circuit Local Rule 0.23(b) ("Rulings by summary order do not have precedential effect."). No other court may rely upon the Second Circuit's decision. Therefore, it is definitionally impossible for this case to create a conflict among the lower courts.

Moreover, the Second Circuit's decision—that the 1997 Amendments to the IDEA do *not* create a categorical bar excluding children who have not previously attended a public school from receiving, in appropriate cases, the long-established tuition-reimbursement remedy created by the IDEA, *Carter*, and *Burlington*—relies on well-established precedent. Petitioner has not and cannot cite any conflicting opinion in the lower courts.

In *Burlington*, this Court held that Congress did not intend that parents such as Mr. F. would have to subject their children to inappropriate educational placements in order to secure the right to reimbursement under the IDEA. 471 U.S. at 370. Because the Second Circuit's decision applied *Burlington* and its progeny correctly, and because there is no conflict among the relevant decisions of the courts of appeals, the Board's petition for a writ of certiorari must be denied.

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

A. Mr. F. and Gilbert Provide Appropriate Notice and Participate in the Board's Attempts to Develop Appropriate IEPs and to Provide FAPE to Gilbert

Mr. F. is the father of Gilbert, a child with a learning disability who was born on October 1, 1989. Mr. F. and Gilbert reside in New York City. In the fall of 1995, Mr. F. enrolled Gilbert at the Stephen Gaynor School ("Gaynor"), a private school that specializes in educating children with Gilbert's learning disabilities, and the school at which Gilbert's older brother, who had similar learning disabilities, had been successfully educated.

In 1996, Mr. F. properly invoked Gilbert's right under the IDEA to receive special educational services from the Board by requesting that Gilbert be evaluated and provided with an Individualized Education Program ("IEP"). Under the IDEA, the Board is a "local educational agency" responsible for evaluating children with disabilities residing within its district and providing them with a free and appropriate public education ("FAPE"). *See* 20 U.S.C. §§ 1400(d)(1), 1404(15)(A) & 1412(a)(3)(A).

In 1997 and 1998, Gilbert was evaluated by representatives of the Board, and Mr. F. and Gilbert fully cooperated with the Board as it developed an IEP for Gilbert. In both 1997 and 1998, however, the IEPs proposed by the Board were inadequate to meet Gilbert's special education needs. Consequently, in accordance with the remedies set forth in the IDEA, *Carter*, and *Burlington*, Mr. F. petitioned for reimbursement of Gilbert's Gaynor tuition for those years.

See generally 20 U.S.C. § 1412 (providing procedures whereby parents may challenge inappropriate IEPs and obtain reimbursement for the costs of an appropriate placement). In both 1997 and 1998, the Board agreed to pay for the cost of Gilbert's education at Gaynor.

In the spring of 1999, Gilbert was once again evaluated by the Board's representatives, and again Mr. F. and Gilbert fully cooperated as another IEP was developed. In June 1999, the Board proposed an IEP, but recommended no specific placement for Gilbert—that is, the Board failed at that time to identify which public school would implement Gilbert's IEP and meet his educational needs. On July 31, 1999, just a month prior to the beginning of the school year, Mr. F. was advised that Gilbert would be placed at P.S. 871.

Mr. F., believing the proposed placement to be inappropriate, exercised his right under N.Y. Educ. Law § 4404(1) and requested an impartial review to determine the appropriateness of the placement. In the meantime, the school year was beginning, and Gilbert remained enrolled at Gaynor for the 1999-2000 school year.

While the Board's brief repeatedly asserts that it provided FAPE to Gilbert (*see, e.g.*, Br. of Pet. at 8), both administrative tribunals that reviewed the extensive factual record held that the Board had *failed* to demonstrate that its proposed placement was appropriate to serve Gilbert's needs. The District Court, which ruled as a matter of law that Gilbert was not entitled to pursue a reimbursement remedy, never considered the facts or made a determination as to whether the Board had provided FAPE.

B. The Impartial Hearing Officer Applies *Carter* and *Burlington* and Orders the Board to Reimburse Mr. F. for Gilbert's Gaynor Tuition

A lengthy hearing on Mr. F.'s petition for reimbursement was held before an impartial hearing officer on January 21, January 31, and February 29, 2000. The Hearing Officer heard testimony from both Mr. F. and from Board representatives.

Applying the first prong of the standard set forth by this Court in *Burlington*, 471 U.S. 359 (1985), and *Carter*, 510 U.S. 7 (1993), to evaluate whether a parent is entitled to reimbursement for a private school placement, the hearing officer determined that the proposed program at P.S. 871 was inappropriate and insufficient to serve Gilbert's needs.

Applying the second prong of the *Carter/Burlington* test, which requires an inquiry into whether the private placement is appropriate for the child, *Carter*, 510 U.S. at 12-13; *Burlington*, 471 U.S. at 370, the hearing officer reviewed the Gaynor program and determined that it was suitable for Gilbert's needs.

Finally, applying the third prong of the test—which requires a reviewer to balance the equities and determine whether they favor reimbursement—the officer found that the equities favored reimbursement to Mr. F., who "did everything asked of him by the Board of Education in regard to this matter." Case No. 37710, Bd. of Educ. of the City of New York, Impartial Hearing Office, at 13 (Apr. 6, 2000). Accordingly, the hearing officer ordered the Board to reimburse Mr. F. for Gilbert's tuition at Gaynor for the 1999-2000 school vear.

C. The State Review Officer Affirms the Decision of the Impartial Hearing Officer, Finding that Mr. F. "is Entitled to Reimbursement"

The Board applied for review of the hearing officer's decision to the New York State Education Department. On March 30, 2001, a State Review Officer ("SRO") affirmed the hearing officer's decision and his reasoning under each prong of the *Carter/Burlington* analysis.

The SRO, citing *Burlington*, stated that "[a] board of education may be required to pay for educational services obtained for a student by his or her parent if the services offered by the board of education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parent's claim." Application of the Board of Educ. of the City Sch. Dist. of the City of New York, No. 00-031, The State Educ. Dep't, State Review Officer, at 5 (Mar. 30, 2001).

The SRO then "determined that the Board of Education failed to demonstrate the appropriateness of its recommended program," that Mr. F. had shown that Gaynor was an appropriate placement for Gilbert, and that "equitable considerations support [Mr. F.]'s claim that he is entitled to reimbursement for the cost of [Gilbert's] tuition at Gaynor for the 1999-2000 school year." *Id.* at 5-6.

Finally, the SRO addressed the argument the Board now asserts in its petition for certiorari, noting that "[t]he Board of Education contends that respondent is barred from receiving an award of tuition reimbursement because his son has not received special education services from a public agency. It relies upon the provisions of 20 U.S.C. § 1412(a)(10)(C)(ii)." *Id.* at 6. This argument, the SRO noted, "has been considered and rejected in prior appeals." *Id.* It was rejected in this instance as well.

D. The District Court Declines to Review the Record and Rules as a Matter of Law that 20 U.S.C. § 1412(a)(10)(C)(ii) Precludes Reimbursement

The Board appealed the administrative decisions to the United States District Court for the Southern District of New York on or about July 26, 2001. *See* 20 U.S.C. § 1415(i)(2)(A). Both sides moved for summary judgment and briefing was completed by July 2002. In January 2005, the District Court granted the Board's motion for summary judgment, reversing the decisions of the two administrative tribunals.

The District Court never reviewed the extensive evidentiary record or the decisions of the lower tribunals holding that the Board's proposed placement was inadequate to meet Gilbert's educational needs. Instead, the Court held that Mr. F. was precluded as a matter of law from claiming reimbursement for Gilbert's educational expenses because Gilbert had never received special education and related services from a public agency. *See Board of Educ. v. Tom F.*, No. 01 Civ. 6845, 2005 WL 22866 (S.D.N.Y. Jan. 04, 2005) ("*Tom F.*").

The District Court based its opinion on 20 U.S.C. § 1412(a)(10)(C)(ii), which was added to the IDEA in 1997. Specifically, the District Court found that this provision categorically bars parents from seeking reimbursement for a child's educational expenses where the child has never attended a public school. *Tom F.*, 2005 WL 22866, at *3.

E. The Second Circuit, in a Summary Order, Vacates and Remands to the District Court for Further Proceedings

Mr. F. appealed the decision of the District Court to the United States Court of Appeals for the Second Circuit. On August 9, 2006, the Second Circuit disposed of the case by summary order, declaring only that "the judgment of the district court be, and hereby is, VACATED and REMANDED for further proceedings in light of this Court's decision in *Frank G. v. Board of Educ.*, No. 04-4981, __ F.3d __ (2d Cir. July 27, 2006)." *Board of Educ. v. Tom F.*, 05-0566, 2006 U.S. App. LEXIS 20961 (2d Cir. Aug. 9, 2006) ("*Tom F.*"). On August 28, 2006, the Board sought a stay of mandate from the Second Circuit in order to file a petition for certiorari with this Court. The stay was granted, and on November 1, 2006, the Board filed its certiorari petition.

REASONS FOR DENYING THE PETITION

The Board's petition for a writ of certiorari does not set forth any argument that would justify this Court's exercise of its certiorari jurisdiction. *See* SUP. CT. R. 10. The Second Circuit's issuance of a non-precedential Summary Order cannot form the basis for review by this Court, because by definition it cannot be relied upon by lower courts. This Court should decline to grant certiorari on this basis alone.

Moreover, the Second Circuit's decision—that the 1997 Amendments to the IDEA do *not* create a categorical bar excluding children who have not previously attended a public school from receiving, in appropriate cases, the long-established tuition-reimbursement remedy created by the IDEA, *Carter*, and *Burlington*—is fully consistent with this

Court's precedent, *see* SUP. CT. R. 10(c), and does not conflict with decisions of the other federal courts of appeals, *see* SUP. CT. R. 10(a). In addition, this case does not present an important question of federal law that is ripe for review by this Court.

A. The Second Circuit's Decision Followed this Court's Precedent

Over twenty years ago, this Court considered the statutory language of the IDEA in conjunction with its underlying policy goals and Congress' stated purposes, and held that children with disabilities were not required to continue in inappropriate placements under inadequate IEPs while their parents challenged school districts' denials of FAPE. *Burlington*, 471 U.S. at 370.

In refusing to accept Petitioner's argument that the statutory language of the IDEA categorically bars tuition reimbursement to parents of children who have not previously attended a public school, the Second Circuit properly ruled that the 1997 Amendments to the IDEA must be read with, not against, this Court's analysis in *Burlington*.

Congress enacted the IDEA "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs. . . ." 20 U.S.C. § 1400(d)(1). As this Court has recognized, the foundation of this educational endeavor is the development of an IEP for each child with a disability. *See Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 176, 205-206 (1982).

Ideally, a child's parents and a team of public school officials collaborate to produce an appropriate IEP, which can be implemented to provide FAPE. But Congress knew that this would not invariably occur, so it provided procedures whereby parents who disagree with a proposed IEP can place their child in an appropriate private school, inform the school district that they are rejecting the IEP, and challenge the district's provision of FAPE in a due process hearing. 20 U.S.C. §§ 1412(a)(6)(A) & 1415(a)-(o).

If parents successfully challenge a proposed IEP and a private school placement is deemed appropriate to meet their child's special education needs, "a court or a hearing officer may require [the public school district] to reimburse the parents for the cost of that [private school] enrollment. . . ." 20 U.S.C. § 1412(a)(10)(C)(ii). This provision for retroactive reimbursement was enacted in response to this Court's decision in *Burlington*.

In *Burlington*, this Court made clear that the IDEA provides courts with broad discretionary power to order reimbursement of private education costs for children with disabilities who have not been provided with FAPE. *Burlington*, 471 U.S. at 369. In *Burlington*, this Court rejected a scenario in which parents of children with disabilities would be faced with a Hobson's Choice—"go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." *Id.* at 370. Congress, this Court found, "undoubtedly did not intend this result." *Id.*

In 1997, during a round of amendments to the IDEA, the following language was added:

> If the parents of a child with a disability, who previously received special education and related

> services under the authority of a public agency, enroll the child in a private elementary or secondary school, without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii). The District Court cited this language in holding that Mr. F. was precluded from seeking reimbursement for Gilbert's educational expenses because Gilbert had never attended public school. *Tom F.*, 2005 WL 22866, at *3.

Relying upon the District Court's reasoning, the Board argued on appeal that prior public school attendance is a prerequisite to any future private school reimbursement under the IDEA. As the Second Circuit characterized this argument, the Board argued that "[o]nly after a learning disabled student enrolled in an inappropriate special education program offered by a public agency would his parents be free unilaterally to enroll him at an appropriate private school and seek reimbursement." *Frank G. v. Board of Educ.*, 459 F.3d 356, 367 (2d Cir. 2006), *pet. for cert. filed*, No. 06-580 2006 WL 3075196, 75 USLW 3248 (U.S. Oct 23, 2006) (Oct. 23, 2006) ("*Frank G.*")

In *Burlington*, however, this Court rejected a reading of the IDEA under which:

> *parents are forced to leave the child in what may turn out to be an inappropriate educational*

> *placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement.* The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.

Burlington, 471 U.S. at 372 (emphasis added).

Interpreting the statutory language through the lens of *Burlington*, the Second Circuit found that such a forced inappropriate placement led to an absurd result—one which would "place the parents of children with disabilities in the untenable position of acquiescing to an inappropriate placement in order to preserve their right to seek reimbursement from the public agency that devised the inappropriate placement." *Frank G.*, 459 F.3d at 372. The Second Circuit's reasoning and holding flow directly from this Court's decision in *Burlington*.

While Petitioner argues that prior public school attendance is a prerequisite to any future private school reimbursement under the IDEA, this assertion runs contrary to the statutory language, the stated goals of Congress, and the interpretation of that language and those goals by this Court.

Section 1412(a)(10)(C) does not state that tuition reimbursement must be denied if a child has not attended public school. Indeed, Petitioner's reading of the statute does not make sense when 1412(a)(10)(C) is read as a whole, including subsections (i)-(iii), and when considered in conjunction with related sections of the IDEA. Numerous courts and the United States Department of Education have

recognized that Section 1412 must be reconciled with the broad remedial language set forth in the remainder of the statute, including Section 1415.[1]

The United States Department of Education—the agency charged with interpreting and enforcing the IDEA—has flatly rejected the interpretation of Section 1412 Petitioner urges here. In its comments to implementing regulations for the provision, the Department of Education notes:

> [h]earing officers and courts retain their authority, as recognized in Burlington and [Carter], to award "appropriate" relief if a public agency has failed to provide FAPE, including reimbursement and compensatory services, under section 615(i)(2)(B)(iii) [Section 1415] in instances in which the child has not yet received special education and related services. This authority is independent of their authority under Section 612(a)(10(C)(ii)[Section 1412] to award

1. *See, e.g. Justin G. ex rel. Gene R. v. Board of Educ. of Montgomery County*, 148 F. Supp. 2d 576, 587 (D. Md. 2001) (holding that "such a construction of the IDEA would produce the absurd result of barring children from receiving a FAPE because their disabilities were detected before they reached school age. [The district's] disturbing interpretation would also place parents of such children in the untenable position of acquiescing to an inappropriate placement in order to preserve their right to reimbursement."); *E.W. and E.W., ex rel. J.W. v. School Bd. of Miami-Dade County Florida*, 307 F. Supp. 2d 1363, 1370 (S.D. Fla. 2004) (holding that "[s]hould Plaintiffs meet their burden of proving that [their child] was denied a FAPE, they should not be prevented from seeking reimbursement under §1412(C)(ii) merely because they refused to place their child, even for a day, in a public school program found to be inappropriate.").

> reimbursement for private placements of children who previously were receiving special education and related services from a public agency.

Committee notes accompanying 34 C.F.R. § 300.403, 64 Fed. Reg. 12601, 12602 (Mar. 12, 1999) (emphasis added).

And Petitioner's reading of the statute is not necessary to give meaning to subsection (ii). Rather, Section 1412(a)(10)(C)(i) is best read as providing that school boards cannot be liable for reimbursement when they have provided FAPE to a child, with clauses (ii) and (iii) clarifying the circumstances under which a subset of children—those who have "received special education and related services under the authority of a public agency"—are eligible for reimbursement.

Petitioner no doubt fears that parents will abuse this process—that parents who never intended to send their children to public schools will be able to obtain reimbursement for private school tuition—and that forcing children to attend public school prior to petitioning for reimbursement of private school costs will prevent such gamesmanship. But Congress does not require children with disabilities to attend public schools. It requires, instead, that all children with disabilities be given a free and appropriate public education, whether that education takes place in a public school or in a private one. Moreover, the IDEA and the case law interpreting it already provide sufficient safeguards against possible abuse of the process.

Under the IDEA, a parent who places his or her child in private school while the appropriateness of a placement is disputed does so at the parent's own financial risk.

Burlington, 471 U.S. at 373-74. If an independent review of the public school placement finds that it did indeed provide FAPE, reimbursement will not be available under the *Carter/Burlington* test. However, no language—statutory, regulatory, or judicial—requires parents who are in the process of disputing inadequate public school placements to place their children in those schools or forfeit a right to reimbursement.

In the twenty years since *Burlington* was decided, and continuing though several amendments to the IDEA—including the 1997 Amendments at issue in this case—courts have consistently held that 20 U.S.C. § 1415 authorizes an equitable remedy of reimbursement, even for children placed in private schools unilaterally, as long as the parents notify the school district that FAPE is at issue and cooperate with the school district's efforts to provide FAPE.[2]

These rulings strongly discourage parents from relying on speculation to arbitrarily reject appropriate placements, and ensure that a school district will not be subject to a reimbursement order where it has been given the opportunity

2. Where a parent fails to provide notice or fails to cooperate with the school board in developing an IEP, courts have appropriately used their equitable powers to deny reimbursement. *See, e.g., Berger v. Medina City School. Dist.*, 348 F.3d 513, 523 (6th Cir. 2003) (holding that "dissatisfied parents were required to complain to the public school to afford the school a chance to remedy the IEP before removing their disabled child from the school"); *M.C. ex rel Mrs. C. v. Voluntown Board of Educ.*, 226 F.3d 60, 68 (2d Cir. 2000) ("[C]ourts have held uniformly that reimbursement is barred where parents unilaterally arrange for private educational services without ever notifying the school board of their dissatisfaction with their child's IEP."); *M.C. ex rel. Ash v. Lake Oswego School Dist., No. 7J*, 980 F.2d 585, 589 (9th Cir. 1992); *Evans v. District. No. 17*, 841 F.2d 824, 829 (8th Cir. 1988).

to provide—and has provided—FAPE to a child with a disability. Requiring children to attend public school under an inappropriate IEP is both unlawful and unnecessary.

B. There is No Circuit Conflict

Petitioner's argument that this Court's intervention is required to avoid "certain confusion . . . throughout the Circuits," Br. of Pet. at 17, is baseless. The Second Circuit's decision in *Frank G.*, 459 F.3d 356, upon which its summary order in this case relied, is supported by an equally thoughtful opinion from the Eleventh Circuit in *M.M. v. School Board of Miami-Dade County*, 437 F.3d 1085 (11th Cir. 2006) ("*M.M.*"). Moreover, both of these opinions provide context for, rather than conflict with, the First Circuit's decision in *Greenland School District v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004) ("*Amy N.*"). Therefore, there is no Circuit conflict and no confusion in the lower courts.

1. *Frank G.* (Second Circuit) does not conflict with *Amy N.* (First Circuit)

Petitioner misstates the focus of the First Circuit's analysis in *Amy N.* According to Petitioner, the First Circuit held that "the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) creates a threshold requirement that tuition reimbursement is only available for children who have previously received special education and related services while in the public school system." Br. of Pet. at 16, citing *Amy N.*, 358 F.3d at 159-60.

But the focus of the First Circuit's analysis in *Amy N.* was *notice*, not public school attendance. In that case, the parents "unilaterally removed" Katie from public school and

placed her in private school "without ever before raising with Greenland school officials the issue of special education services for Katie." *Amy N.*, 358 F.3d at 152. As the First Circuit explained, "[t]he point is that there was *no notice at all* to the school system before Katie's removal from Greenland that there was any issue about whether Katie was in need of special education." *Id.* at 160 (emphasis added). The "statutory provisions" of the IDEA, the court found,

> make clear Congress's intent that *before* parents place their child in private school, they must at least *give notice* to the school that special education is at issue. This serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided in the public schools.

Id. (emphasis added). The implementing regulations promulgated by the Department of Education, in particular 34 C.F.R. § 300.403, which expressly authorizes unilateral placements in private schools "*when FAPE is at issue*," further reinforce this interpretation because, as the court noted, the applicable CFR provisions "indicate[] that the Department of Education views notice as critically important in the statutory scheme: it is difficult to imagine FAPE being 'at issue' when neither the school nor the child's parents have ever raised the question of FAPE." *Id.* at 161. In announcing its holding, the First Circuit explained that its "conclusion that tuition reimbursement is unavailable [is] due to the parents' lack of notice to the school system while Katie was enrolled there. . . ." *Id.* at 162.

Unlike *Amy N.*, the dispute in this case began when Mr. F. placed the Board on notice that he was seeking FAPE for Gilbert.[3] Similarly, *Frank G.*'s story begins when the appropriate public school district received "notification from Anthony's parents" that FAPE was at issue. *Frank G.*, 459 F.3d at 360. Thus, *notice*, an important part of the First Circuit's decision in *Amy N.*, was not at issue in *Frank G.* Therefore, the Second Circuit had to confront in both cases the school district's assertion that under 20 U.S.C. § 1412(a)(10)(C)(ii) "[o]nly after a learning disabled student enrolled in an inappropriate special education program offered by a public agency would his parents be free unilaterally to enroll him at an appropriate private school and seek reimbursement." *Id.* at 367. The Second Circuit properly rejected this absurd result. *Id.* at 372.

In response to the school district's reliance on *Amy N.*, the Second Circuit correctly distinguished that case:

> [*Amy N.*] held only that parents of a learning disabled child, who unilaterally placed their child in a private school without notice to the local educational agency of their child's need for special education and without offering the agency an opportunity to prepare an IEP that is appropriate to the child's needs, were not eligible for tuition reimbursement.

Id. at 374-75. Although the Second Circuit does not endorse all of the First Circuit's statutory analysis in *Amy N.*, it "agree[s] completely with the result reached in [*Amy N.*]." *Id.* at 375.

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3. The factual record in this case is not developed at the federal level because the district court's decision was not based upon a review of the facts. But the Impartial Hearing Officer and the SRO both found that Mr. F. had complied with the notice provisions and that the equities favored reimbursement of Gilbert's Gaynor tuition.

Because *Frank G.* does not conflict with *Amy N.*, there can be no conflict between the First Circuit's decision and the instant case, which relies upon the reasoning of *Frank G.* Like the parents in *Frank G.*, Tom F. notified the Board that FAPE was at issue. Thus, the Board was able "to assemble a team, evaluate [Gilbert], devise an appropriate plan, and determine whether a free appropriate public education can be provided in the public schools." *Amy N.*, 358 F.3d at 160. After a school district has had the opportunity to prepare an IEP, any parent of a disabled child is well within their rights under the IDEA to challenge the proposed IEP, as Tom F. did in this case.

2. *Frank G.* (Second Circuit) agrees with *M.M.* (Eleventh Circuit)

Petitioner's argument that this Court's refusal to grant certiorari will create "certain confusion . . . throughout the Circuits," Br. of Pet. at 17, is even less convincing in light of the Eleventh Circuit's decision in *M.M.*, 437 F.3d at 1085, which is wholly consistent with the Second Circuit's decisions in *Frank G.* and in this case.

C.M., a disabled child, was enrolled in private school during the development of her IEP. Following her parents' rejection of the proposed IEP, she remained in private school while her parents challenged the public school district's denial of FAPE. The Eleventh Circuit found that C.M.'s participation, prior to entering school, in an early intervention program constituted the receipt of "special education and related services under the authority of a public agency" pursuant to 20 U.S.C. § 1412(a)(10)(C)(ii). *Id.* at 1098.[4]

---

4. Respondent argued in both the district court and the Second Circuit, that Gilbert had "previously received special education and

(Cont'd)

In addition, like the Second Circuit, the Eleventh Circuit directly confronted the issue of "whether C.M.'s parents are entitled to any form of reimbursement given that C.M. is currently enrolled in private school and was never enrolled in public school." *Id.* Relying on the reasoning of *Burlington* and its interpretation by other federal courts, the Eleventh Circuit found that

> forcing parents into accepting inadequate IEPs in order to preserve their right to reimbursement runs contrary to the rights recognized in the *Burlington* line of cases. Therefore, we conclude that parents are not required in all cases to first enroll their

---

(Cont'd)

related services under the authority of a public agency." Gilbert was evaluated by the Board's representatives in 1997, 1998, and 1999, and the Board proposed an IEP for Gilbert in each of those years. The IDEA's implementing regulations support this position. 34 C.F.R. § 300.24 lists several illustrative examples of "related services," including: "early identification and assessment of disabilities in children," "medical services for diagnostic or evaluation purposes," "parent counseling and training"—which is in turn defined as "providing parents with information about child development" and "helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP"—and "psychological services," which is interpreted to include "administering psychological and educational tests, and other assessment procedures" and "interpreting assessment results." 34 C.F.R. § 300.24. As this Court has noted, Congress "envision[ed] the IEP as the centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311 (1988). Thus, although the Second Circuit did not reach this argument, it is clear that the provision of and annual review of an IEP qualifies as "special education and related services" under the IDEA and its accompanying regulations.

> child in public school pursuant to an inadequate IEP in order to preserve their right to reimbursement.

Id. at 1099.

Thus, in *M.M.* the Eleventh Circuit reached the same result as the Second Circuit did in *Frank G.* and *Tom F.*—children with disabilities who are denied FAPE by their local public school district are *not* required to acquiesce to an inadequate public school placement in order to later obtain reimbursement for an appropriate special education at a private school, and are not categorically barred from receiving tuition reimbursement solely because they never attended a public school.

This Court has discretion to exercise its certiorari jurisdiction and to provide guidance to the lower federal courts where there is a conflict in the Circuits. Petitioner, seeking to convince this Court to grant its petition for a writ of certiorari, sees conflict where there is none. The Second Circuit's decision in *Frank G.*, and therefore its decision in this case, does not conflict with the First Circuit's decision in *Amy N.* Moreover, *Frank G.* is entirely consistent with the Eleventh Circuit's decision in *M.M.* Because there is no conflict among these decisions, the Court should deny the petition.

C. This Case is an Improper Vehicle for Supreme Court Review

The Second Circuit decided this case by summary order, declaring that "the judgment of the district court be, and it hereby is, VACATED and REMANDED for further proceedings in light of this Court's decision in *Frank G. v. Board of Educ.*, No. 04-4981, __ F.3d __ (2d Cir. July 27, 2006)." *Tom F.*, 2006 U.S. App. LEXIS 20961. Under the local rules of the Second Circuit,

this decision has no precedential effect. *See* Second Circuit Local Rule 0.23(b) ("Rulings by summary order do not have precedential effect."). Because no court may rely upon this decision, it cannot form the basis for a conflict among the Circuits, and therefore there is no "compelling" reason for this Court to grant certiorari.

The District Court, the proper locus of factual inquiry, should be allowed to consider the facts of this case "in light of [the Second Circuit]'s decision in *Frank G. v. Board of Educ. . . . .*" *Id.* As this Court has noted when discussing its own summary dispositions, this particular form of resolution can leave important questions "lurk[ing] in the record," inadequately presented and ultimately unresolved. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

The District Court decided this case as a matter of law, declining to examine the evidentiary record that was considered by both the Impartial Hearing Officer and the SRO. Thus, the District Court did not consider or apply the three prongs of the *Carter/Burlington* test—it did not consider whether Petitioner offered Gilbert an appropriate placement that would provide him with FAPE; it did not consider whether Gaynor was an appropriate placement for Gilbert; and it did not balance the equities to determine whether or not Mr. F. was entitled to reimbursement. *See generally Carter*, 510 U.S. at 12-13; *Burlington*, 471 U.S. at 370 (providing the structure for this analysis).

The District Court, not this Court, is the proper forum for consideration of the particular facts of this case "in light of [the Second Circuit]'s decision in *Frank G. v. Board of Educ. . . . ,*" *Tom F.*, 2006 U.S. App. LEXIS 20961, at *1, and under the *Carter/Burlington* framework.

D. Petitioner's Spending Clause Argument is Waived Because it Was Not Raised Below and is Meritless

Petitioner's brief asserts, without explanation, that "the Second Circuit's decision is inconsistent with this Court's decision in *Arlington Central School District Board of Education v. Murphy*, __ U.S. __, 126 S. Ct. 2455 (2006)." Br. of Pet. at 19. To the extent that Petitioner relies on *Arlington* to argue that the IDEA's genesis under the Spending Clause must influence the outcome of this dispute, this argument was not raised below, and Petitioner has forfeited it. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived."); *TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001) (declining to reach question "not raised or briefed below"). Moreover, for this point of law, *Arlington* relied on this Court's decision in *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005) ("*Schaffer*"). *Schaffer* was available to Petitioner during the pendency of its appeal to the Second Circuit, but Petitioner did not bring it to the attention of that court.

Even if this Court were to consider Petitioner's argument, *Arlington* does not support Petitioner's asserted position. In *Arlington*, this Court held that the statutory language of 20 U.S.C. § 1415(i)(3)(B), a fee-shifting provision of the IDEA, did not provide sufficiently clear notice to state officials "engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds," that states could be potentially liable upon losing an IDEA litigation not only for attorney's fees, but expert witness fees as well. 126 S. Ct. at 2459.

The key question in *Arlington* was "whether the IDEA furnishes clear notice regarding the liability at issue. . . ." *Id.* Petitioner's assertion that "the Second Circuit's decision is inconsistent with [that rule]," Br. of Pet. at 19, is incorrect.

The IDEA makes clear to educational authorities that, where an authority fails to provide FAPE to a child with a disability, it may be liable for that child's private-school tuition. *See* 20 U.S.C. § 1412(a)(10)(C) ("a court or hearing officer may require the agency to reimburse the parents for the cost of that [appropriate private school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child. . . ."). Well-established precedent confirms that obligation—beginning with *Carter* and *Burlington*—and continuing through scores of other cases over two decades. Accordingly, school districts have had ample notice of their obligations in this regard. There is simply no basis for Petitioner's argument that the statute fails to put officials on notice of their obligations.

As this Court noted over twenty years ago, "[t]he [IDEA] contemplates that [special] education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children, but the Act also provides for placement in private schools *at public expense* where this is not possible." *Burlington*, 471 U.S. at 369 (emphasis added).

Given the clear statutory language confirmed by this and other courts, Petitioner cannot argue that it did not have sufficiently clear notice that where it failed to provide FAPE it could be potentially liable for private school costs. Thus, Petitioner's reliance on *Arlington* is both ill-timed and unconvincing.

CONCLUSION

Based upon the foregoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 06-637

FILED
MAY 11 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F., on behalf of GILBERT F., a minor,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED FEBRUARY 26, 2007

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APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

General Docket
US Court of Appeals for the Second Circuit

Court of Appeals Docket #: 05-0566-cv Filed 2/3/05
Nsuit : 3890 STATUTES-Other
Board of Education v. F.
Appeal from: SDNY (NEW YORK CITY)

Case type information:

Civil
Private
None

Lower court information:

District: 01-cv-6845
Trial Judge: George Daniels
MagJudge:
Date Filed: 07/26/01
Date order/judgement: 1/6/2005
Date NOA filed: 1/31/2005

Fee status: Paid

Panel Assignment:

Panel: ALK RDS TS 40 Foley Sq.

Date of decision: 8/9/06

Appendix A

Prior cases: NONE

Current cases: NONE

Official Caption 1/

INDIV

DISPOSED

Docket No. [s] : 05-0566 -cv

Board of Education of the City School District of
The City of New York,

Plaintiff-Appellee,

v.

Tom F., on behalf of Gilbert F., a minor child,

Defendant-Appellant.

Authorized Abbreviated Caption 2/

Docket No. [s] : 05-0566 -cv

Board of Education v. F.

1/ Fed. R. App. P. Rule 12 [a] and 32 [a].

2/ For use on correspondence and motions only.

Appendix A

Docket as of April 17, 2007 8:17 pm

INDIV

DISPOSED

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Appendix A

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Amicus Curiae [LD n]
Tom F.
Paul G. Gardephe Esq.
Defendant-Appeliant [LD n]
Patterson, Belknap, Webb, & Tyler
1133 6th Ave.
New York, NY, 10036
212-336-2000

INDIV

DISPOSED

Appendix A

* * *

8/9/06	Judgment filed; judgment of the district court is VACATED and REMANDED by detailed order of the court without opinion filed. (RDS) [Entry date Aug 9 2006] [AM]

* * * *

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (FOLEY SQUARE)

U.S. DISTRICT COURT
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (FOLEY SQUARE)
CIVIL DOCKET FOR CASE #: 1:01-CV-06845-GBD

Board of Education of the City School District of the City of New York v. Tom F., on behalf of Gilbert F., a minor child
Assigned to: Judge George B. Daniels
Referred to: Magistrate Judge Michael H. Dolinger (Settlement)
Demand: $0
Cause: 28:1331 Fed. Question: Other

Date Filed: 07/26/2001
Date Terminated: 01/06/2005
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

Appendix B

Plaintiff

Board of Education of the City School District of The City of New York.
represented by
Michael Emanuel DeLarco
Heller Ehrman , LLP (NYC)
Times Square Tower
7 Times Square
New York, NY 10036-6524
(212) 832-8300
Fax: (212) 763-7600
Email: michael.delarco@hellerehrman.com
LEAD ATTORNEY

Michael D. Hess
Corporation Counsel of the City of New York

100 Church Street
Room 2-173
New York, NY 10007
(212) 788-0956
LEAD ATTORNEY

V.

Appendix B

Defendant

Tom F.
on behalf of Gilbert F., a minor child
represented by
Lauren A. Baum
Neal H. Rosenberg
9 Murray Street
Suite 4 West
New York, NY 10007
(212) 732-9450
LEAD ATTORNEY

Date Filed	Docket Text

* * *

08/14/2001	ORDER, initial pretrial conference will be held for 12:00 10/10/01, in courtroom 219, 40 Foley Sq., NY, NY. (signed by Judge George B. Daniels) (cd) (Entered: 08/15/2001)
09/06/2001	Memo-Endorsement on letter addressed to Judge Daniels from Neal Howard Rosenberg, dated 08/23/01; Defendant's request for an extension of time until 09/28/01 to respond to plaintiff's amended complaint is granted; (signed by Judge George B. Daniels); Copies mailed. (djc) (Entered: 09/07/2001)

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10/02/2001	Memo-Endorsement on letter addressed to Judge Daniels from Neal Howard Rosenberg, dated 9/28/01; granting counsel for the defendant's request to extend the time to respond to the amended complaint from 9/28/01 until 11/9/01. (signed by Judge George B. Daniels); Copies mailed. (kkc) (Entered: 10/03/2001)
11/13/2001	ANSWER to Complaint by Tom F. (Attorney Lauren A. Baum from the Firm: Neal H. Rosenberg). (yv) Modified on 3/22/2007 (kkc). (Entered: 11/15/2001)

* * *

11/20/2001	ORDER; pltff's motion for summary judgment is due on 1/25/02. Deft's cross motions for summary judgment is due 3/8/02. Any reply by pltff is due by 4/2/02. (signed by Judge George B. Daniels); Copies mailed. (sn) (Entered: 11/21/2001)
01/25/2002	REVISED ORDER, reset pltff Board of Education's motion for summary judgment filing deadline for 2/15/02; reset deft's cross motion for summary judgment due for 3/29/02; Any reply by pltff is due by 4/19/02. The parties do not request oral argument. (signed by Judge George B. Daniels); Copies mailed. (kg) (Entered: 01/28/2002)

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02/01/2002 Memo-Endorsement on letter addressed to Judge Daniels from Michael Delarco, dated 1/31/02, granting plntf's request that the 2/6/02 conference be adjourned until sometime after the motion for summary judgment has been fully briefed (signed by Judge George B. Daniels); Copies mailed. (cd) (Entered: 02/04/2002)

02/14/2002 Memo-Endorsement on letter addressed to Judge Daniels from Michael Delarco, dated 02/13/02; reset plaintiff's summary judgment motion filing deadline for 2/25/02; reset defendant's summary judgment cross motion due for 4/8/02; plaintiff's reply is extended until 04/29/02; (signed by Judge George B. Daniels); Copies mailed. (djc) (Entered: 02/19/2002)

02/25/2002 REVISED ORDER; Plaintiff Board of Education's motion for summary judgment is due on 03/11/02; Defendant's cross-motion for summary judgment is due on 04/22/02; any reply by plaintiff is due by 05/13/02. the parties do not request oral argument;(signed by Judge George B. Daniels); Copies mailed. (djc) (Entered: 02/26/2002)

03/08/2002 ORDER, that plaintiff Board of Ed. motion for summary judgment is due no 3/25/02; Defendant's cross-motion for summary judgment is due on 5/6/02; Any reply by

plaintiff is due by 5/28/02; The parties do not request oral argument. (signed by Judge George B. Daniels); Copies mailed. (tp) (Entered: 03/08/2002)

* * *

03/29/2002 NOTICE OF MOTION by Board of Education for an Order pursuant to Rule 56(b) of the FRCP granting summary judgment in favor of plaintiff. Return date not indicated. Statement of Undisputed Facts and Declaration of Michael Delarco in support of motion attached. (yv) (Entered: 04/01/2002)

03/29/2002 MEMORANDUM OF LAW by Board of Education in support of [13-1] motion for an Order pursuant to Rule 56(b) of the FRCP granting summary judgment in favor of plaintiff. (yv) (Entered: 04/01/2002)

05/02/2002 ORDER; deft's cross-motion for summary judgment is due on 6/3/02; pltff's reply is due 6/25/02 for [13-1] motion for an Order pursuant to Rule 56(b) of the FRCP granting summary judgment in favor of plaintiff. (signed by Judge George B. Daniels); Copies mailed. (sac) (Entered: 05/03/2002)

06/06/2002 ORDER. Plaintiff Board of Education's motion for summary judgment is due on 03/25/02; Defendant's cross-motion for

summary judgment is due on 06/07/02; any reply by plaintiff is due by 07/01/02. Parties do not request oral argument; (signed by Judge George B. Daniels); Copies mailed. (djc) (Entered: 06/12/2002)

* * *

06/12/2002 MEMORANDUM OF LAW by Tom F. in support of [17-1] motion for an order striking the declaration of Linda Wernikoff in support of plaintiff's motion for summary judgment as improper under Rule 56(e) of the FRCP, and [17-2] motion for an order pursuant to Rule 56(b) of the FRCP granting summary judgment in the favor of defendant. (kw) Modified on 3/22/2007 (kkc). (Entered: 06/18/2002)

06/12/2002 MEMORANDUM OF LAW by Tom F. in support of re: [17-1] motion for an order striking the declaration of Linda Wernikoff in support of plaintiff's motion for summary judgment as improper under Rule 56(e) of the FRCP, [17-2] motion for an order pursuant to Rule 56(b) of the FRCP granting summary judgment in the favor of defendant, and in opposition to [13-1] motion for an Order pursuant to Rule 56(b) of the FRCP granting summary judgment in favor of plaintiff. (kw) Modified on 3/22/2007 (kkc). (Entered: 06/18/2002)

Appendix B

06/12/2002	RULE 56.1 STATEMENT filed by Tom F. (kw) Modified on 3/22/2007 (kkc). (Entered: 06/18/2002)
07/02/2002	ORDER, Response to motion reset to 7/22/02 for [17-1] motion for an order striking the declaration of Linda Wernikoff in support of plaintiff's motion for summary judgment as improper under Rule 56(e) of the FRCP, reset to 7/22/02 for [17-2] motion for an order pursuant to Rule 56(b) of the FRCP granting summary judgment in the favor of defendant , reset Reply to Response to Motion reset to 7/22/02 for [13-1] motion for an Order pursuant to Rule 56(b) of the FRCP granting summary judgment in favor of plaintiff. (signed by Judge George B. Daniels); Copies mailed. (pl) (Entered: 07/02/2002)
07/23/2002	REPLY MEMORANDUM by Board of Education re: defendant's opposition memorandum of law and in opposition to [17-1] motion for an order striking the declaration of Linda Wernikoff in support of plaintiff's motion for summary judgment as improper under Rule 56(e) of the FRCP, [17-2] motion for an order pursuant to Rule 56(b) of the FRCP granting summary judgment in the favor of defendant. (yv) (Entered: 07/25/2002)
07/23/2002	DECLARATION of Michael DeLarco by Board of Education presenting before the

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Court documents in support Re: [13-1] motion for an Order pursuant to Rule 56(b) of the FRCP granting summary judgment in favor of plaintiff and in opposition to [17-1] motion for an order striking the declaration of Linda Wernikoff in support of plaintiff's motion for summary judgment as improper under Rule 56(e) of the FRCP, [17-2] motion for an order pursuant to Rule 56(b) of the FRCP granting summary judgment in the favor of defendant. (yv) (Entered: 07/25/2002)

01/04/2005 ORDER granting [13] Motion for Summary Judgment, denying [17] Motion for Summary Judgment. The Clerk is directed to close this case (Signed by Judge George B. Daniels on 1/3/05) (yv,) (Entered: 01/05/2005)

01/04/2005 Transmission to Judgments and Orders Clerk. Transmitted re: [24] Order on Motion for Summary Judgment, to the Judgments and Orders Clerk for preparation of Judgment. (yv,) (Entered: 01/05/2005)

01/06/2005 CLERK'S JUDGMENT granting plaintiff's motion for summary judgment reversing the SROs grant of tuition reimbursement to defendant and denying defendant's motion. (Signed by J. Michael McMahon, clerk on 1/6/05) (ml,) (Entered: 01/06/2005)

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01/31/2005	NOTICE OF APPEAL from [24] Order on Motion for Summary Judgment,. Document filed by Tom F. Filing fee $ 255.00, receipt number E 532562. Copies of Notice of Appeal mailed to Attorney(s) of Record: NYC Corporation Counsel. (pr,) Modified on 3/22/2007 (kkc). (Entered: 02/01/2005)

* * *

03/02/2005	USCA SCHEDULING ORDER as to [26] Notice of Appeal filed by Tom F., USCA Case Number 05-0566-cv. Roseann B. MacKechnie, Clerk USCA. Certified: 2/24/05. Appeal Record due by 3/24/2005. Appellant Brief due by 3/31/2005. Appellee Brief due by 5/2/2005. (dt,) Modified on 3/22/2007 (kkc). (Entered: 03/07/2005)

* * * *

APPENDIX C — FINDINGS OF FACT AND DECISION OF IMPARTIAL HEARING OFFICER, DATED APRIL 6, 2000

Board of Education of the City of New York
Impartial Hearing Office
131 Livingston Street - Room 201
Brooklyn, New York 11201
Telephone: (718) 935-3280
FAX: (718) 935-2528

FINDINGS OF FACT AND DECISION

Case Number:	37710
Student's Name:	Gilbert Freston
Date of Birth:	October 1, 1989
District:	3
Hearing Requested By:	Parent
Dates of Hearing:	January 6, 2000 January 21, 2000 January 31, 2000 February 28, 2000
Hearing Officer:	Michael Lazan, Esq.

NAMES AND TITLES OF PERSONS WHO APPEARED JANUARY 6, 2000

Neal Rosenberg	Attorney	Parent

NAMES AND TITLES OF PERSONS WHO APPEARED JANUARY 21, 2000

Neal Rosenberg	Attorney	Parent
Alexandra Michalos	Attorney, Officer of Legal Services	Board of Education
Helen Reichel	Chairperson Designee, Educational Evaluator, CSE, District 3	Board of Education
Craig Czanecki	Psychologist, CSE, District 3	Board of Education

NAMES AND TITLES OF PERSONS WHO APPEARED JANUARY 31, 2000

Neal Rosenberg	Attorney	Parent
Anne Marie Bowler	Law Clerk	Parent
Tom Freston	Father	
Krista Stackow (via telephone)	Teacher, Steven Gaynor School	Parent
Alexandra Michalos	Attorney, Office of Legal Services	Board of Education

NAMES AND TITLES OF PERSONS WHO APPEARED FEBRUARY 28, 2000

Neal Rosenberg	Attorney	Parent
Laura Keller (via telephone)	Pathologist. Steven Gaynor School	Parent
Susan Miller (via telephone)	Reading Teacher. Steven Gaynor School	Parent
Alexandra Michalos	Attorney, Office of Legal Services	Board of Education
Jennifer Feinberg (via telephone)	Teacher	Board of Education

Appendix C

On January 21, January 31, and February 28, 2000, the matter of Gilbert F. came before me as impartial hearing officer pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415(f)(1). (The hearing was previously adjourned by another hearing officer.) Appended to the record is a list of persons in attendance and of documents submitted into evidence. The hearing was convened on the parent's request for *Florence County School District Four v. Carter by Carter,* 114 S.Ct. 361 (1993) reimbursement.

Gilbert is a ten year old classified as learning disabled who attends a non-public school, the Stephen Gaynor School (Gaynor), in Manhattan. After a Committee on Special Education (CSE) review indicating Gilbert should be placed in a Modified Instructional Services 1 (MIS 1) class the parent objected and sought tuition reimbursement. The hearing followed.

BOARD OF EDUCATION'S TESTIMONY AND EVIDENCE

The Board of Education testified by Helen Reichel, an educational evaluator; Craig Czarnecki, a school psychologist; and Jennifer Feinberg, a teacher.

Dr. Czarnecki testified that he observed Gilbert in his classroom and participated in the CSE review pertaining to Gilbert. Though he did not conduct the psychological evaluation, he testified to the evaluation by describing Gilbert as a child who gave short answers to questions but nonetheless was able to obtain average to high average scores

on the Weschsler Intelligence Scale for Children III with relative sub-strengths in verbal abstract reasoning. (Tr. at 9, 10)

In terms of graphomotor and fine motor coordination, his formal score was below average. With respect to emotional testing. Gilbert had difficulty expressing his feelings, needed a lot of encouragement and seemed to lack in self-confidence and self-esteem, though he had good reality testing and a high level of aspiration. (Tr. at 10)

The review team indicated that this was a child with academic weakness and difficulty maintaining focus. He has Attention Deficit Disorder and is receiving medication. Counseling was recommended to bolster self-esteem, with related goals. (Tr. at 13-14)

The observation, at Gaynor, did not reflect any "silliness" or emotional issues. (Tr. at 16)

On cross-examination, Dr. Czarnecki indicated that he had been told by a "Susan Clue" at Gaynor that teachers at Gaynor would be available on June 23, 1999, the date of the review. However, when the school was called the review team was told that no teachers were available that day. The review had originally been scheduled for May, but was rescheduled to the only mutually available date, June 23. He testified that the teachers were in the building but were involved in meetings. (Tr. at 17-18, 20) The review team was told that, after the day in question, the teachers would be off for the summer and no one was available to speak with them. (Tr. at 30)

He indicated that drafts of the speech and language goals were brought to the CSE review meeting. He testified that some goals were draft goals, and some were developed at the review. (Tr. at 23, 25) No speech and language therapist was at the review. (Tr. at 29)

He indicated that the child had been through two speech/ language therapy evaluations in the 1998-1999 school year which showed weakness in listening for paragraphs. As a result, speech and language remediation was recommended. (Tr. at 34-35)

On further questioning, he indicated that the special education teacher at the review was Ms. Reichel. He indicated that Gilbert's learning disability was in reading and spelling. (Tr. at 37-38) He indicated that the review learn credited the speech and language evaluation of Ms. Pivor (who recommended therapy) over the recommendation of Ms. Baldinger (who didn't) because a child who has listening deficits will have trouble in a classroom setting. (Tr. at 46)

He indicated that no speech and language therapist was at the review because none was available and a prior consultation had been done. He did not indicate affirmatively that draft goals were changed at the review, indicating that it can be that many children with the same kind of learning problem can have the same goals. (Tr. at 49, 50-51)

Ms. Reichel an educational evaluator who is also a licensed special education teacher testified that she did not conduct the review but did review Gilbert's records. (Tr. at 59-60) She indicated that Gilbert had trouble in reading

comprehension which was measured in the low average range. She also indicated that he had trouble with decoding where there are consonant clusters and diphthongs. Overall, his decoding was at the mid-third grade level "instructionally" and that his comprehension was at the mid-second grade level "instructionally." In math, he did well, but had trouble with so-called "two-step" problems. In writing, his spelling was problematic and his written expression was generally unenriched. In terms of expressive language, he did not initiate the conversation. (Tr. at 60-66)

In terms of the speech and language evaluations, Gilbert had trouble with oral listening, especially where there was no visual accompaniment to the auditory, and oral narration. (Tr. at 69-70)

An occupational therapy report found that Gilbert had adequate handwriting skills. (Tr. at 72-73)

A MIS I was recommended because of his learning disabilities and his attentional problems require a multi-sensory approach. (Tr. at 73-74)

At the review, the team went over the reports and developed the goals. Most of the goals were written before the meeting. The goals were not necessarily reviewed with the parent. (Tr. at 75-76, 78)

On cross-examination-examination, she indicated that she had not discussed the goals or the case generally with Dr. Hager, who had done the educational evaluation. She did not discuss the goals or the case generally with his teacher.

In writing the goals, she did not discuss the goals or the case generally with anyone except Ms. Pivor. (Tr. at 90, 93, 95)

She indicated that though the evaluator recommended giving Gilbert the use of a computer, this was not included on his IEP because it was not corroborated by the occupational therapy or the teacher report. (Tr. at 95)

On further questioning, she indicated that she had not taught special education in fifteen years. She indicated that the CSE review meeting was originally set up for May 28th, but it had been canceled. (Tr. at 100-104)

Ms. Feinberg testified that she teaches at a MIS 1 classroom at P.S. 77, the Lower Lab School for Gifted Education. (Tr. at 199) There are nine students in the class with student teachers three days a week. The age range in the class is 8-10, and the functional levels of the children is K to high third grade level in reading, and K to fourth grade in math. (Tr. at 201-202)

With respect to reading, two children are in the K range. The majority of the children are in the first to second grade level. With respect to math, two children are in the K range. The majority of the children are in the "two to three" range. (Tr. at 202)

In view of Gilbert's IEP, indicating that Gilbert's decoding was mid-third grade and his reading comprehension was mid-second grade she indicated that one student would be at his level insofar as decoding was concerned and three students would be at his level insofar as comprehension was

concerned. She indicated that she addresses the range of functioning levels in the class by practicing "private reading" and having individual reading groups. The reading program is a "balanced literacy" program with reading aloud, shared reading, guided reading, and reader's workshops. (Tr. at 203) She indicated that, during reading, it's very individualized. (Tr. at 209)

She indicated that she would work on Gilbert's spelling by interactive writing sessions where students come up with their own strategies for spelling. She would work on Gilbert's writing by using "webbing," where characters are developed. The math curriculum is "hands on" where children work in pairs or independently to solve problems and that, thereafter, the children meet in a circle to discuss strategies used. To deal with social and behavioral issues, a very positive reinforcing environment is established. No children have severe behavioral issues, though some do get counseling. The children's physical development is such that one child receives occupational therapy. (Tr. at 204, 206-207)

Insofar as Gilbert's levels are concerned in comparison to the other children in the class, his math is higher than the majority and his reading is higher than the majority, though there are students at his level. (Tr. at 208) She indicated that his placement would be appropriate in her class. (Tr. at 211)

On cross-examination she indicated that the student teacher is at the school three days a week to last and until NYU closes for the school year. (Tr. at 213-214) She indicated that with respect to reading levels in her class, that they specifically ranged from .7 to 3.7. Math levels range from a

.7 to a 4.0, but that the child whose level is 4.0 is mainstreamed with a class of gifted children. There are four groups of reading students and two groups of math students in the class. The student teacher benefits the children when she is in class, but the teaching is not any different. When the children are pulled out for science, Spanish, art and music, for a total of seven periods per week, they are not taught by trained special education teachers. (Tr. at 218-219, 220, 222, 224-225)

On further questioning, she indicated that when her class is being taught subjects that require reading, lessons are read aloud. (Tr. at 226-227)

The Board of Education also presented legal arguments contending the annual review process has no timeline, that the Board of Education can appoint a teacher qualified in the area of disability for the purposes of the review, and that children in the child's class can exceed three years in range of functioning. (Tr. at 185-187)

THE PARENT'S TESTIMONY AND EVIDENCE

The parent presented himself; the testimony of Anne Marie Bowler, a law student; Krista Stachow, Gilbert's teacher: Laura Keller. Gilbert's speech and language teacher; and Susan Miller. Gilbert's reading teacher.

The parent indicated that he traveled from Asia to appear at the Board of Education on May 28th for a CSE review meeting. He indicated that the meeting was cancelled because a Board of Education party was not able to attend. He was

then told of the rescheduled date, June 23rd,without being asked previously about whether the time and date were good for him. He did appear, however, on June 23rd. He indicated that Iris Fruend. an individual at the CSE meeting, is in fact one of Gilbert's teachers. (Tr. at 114-115, 122)

The parent received a notice of placement on July 29, 1999. He indicated that he promptly attended all meetings called by the CSE in regard to Gilbert's evaluation. He indicated that he would have observed the Board of Education's placement if it were made prior to the end of the prior school year. (Tr. at 116, 122)

He indicated that he pays for private speech/language therapy yearly, and that Gilbert receives speech/language therapy from the school. (Tr. at 118)

He indicated that he has seen steady improvement at Gaynor to the point where he wonders whether Gilbert should be mainstreamed, though people at Gaynor convinced him that he still needed a "close hands on" relationship with teachers. (Tr. at 119) He indicated that at Gaynor. they pull Gilbert out for reading and speech, his core learning disabilities. (Tr. at 119-120)

On cross-examination he indicated that he has never visited a recommended public school placement before. He indicated that Gilbert goes to a summer camp for "regular" children. He indicated that he needs a class size smaller than 15:1, and that he now is in a class of 6 or 7 with 2 teachers. He indicated that he had read the goals on the IEP but didn't remember whether he had any objections to them. (Tr. at 123, 125-126)

On further questioning, he indicated that Gilbert has been at Gaynor since kindergarten since he had been evaluated and diagnosed as learning disabled early on. (Tr. at 128-129) He indicated that Gilbert's learning disability is language-based, and that attention deficit hyperactivity disorder (ADHD) "underlines" a lot of his behavior. His reading skills are not great, writing skills below grade level and he has difficulty detecting nuances in speech. (Tr. at 129, 130)

When asked how Gilbert would do in a MIS 1 program, the parent indicated that "he didn't know" but that he had been told by the people at Gaynor that the class size he is in now is very advantageous to him. (Tr. at 130)

In terms of progress, he testified that Gilbert now picks up a book without prodding and is more interested in the outside world. (Tr. at 130-131)

Ms. Bowler, a law student at the office of Neal Rosenberg, Esq. who accompanied the parent to the CSE meetings testified that with respect to the first meeting, she and the parent were told that there was no parent member available and that the meeting had to be rescheduled. At the second meeting on June 23rd she indicated that there was no appearance from anyone at Gaynor there. (Tr. at 141)

On cross-examination she indicated that she knew there was no representative from Gaynor at the review because the parent did not recognize any such person and did not speak to any of the "Board of Education" people at the meeting. (Tr. at 143) She look notes right after the meeting memorializing this. (Tr. at 145: Exh. A)

Appendix C

Ms. Stachow, Gilbert's teacher, testified that she teaches eight students with another teacher, ranging from 9.11 to 11.2. All children have learning disabilities, and all have speech and language issues. Seven out of eight children, including Gilbert, have language-based learning disabilities. Comprehension difficulties are prevalent. (Tr. at 150-151)

Gilbert has problems with expressive language manifesting in a lack of specificity, weak vocabulary and weak word find skills. He has difficulty formulating ideas and receptive language difficulties as well. His speech and language difficulties are not in the conventional sense in that people can't understand him. He reads at a fourth grade level. (Tr. at 152, 161)

She indicated that Gilbert gets language remediation once a week with another student, with a speech and language therapist for a half-hour. He sees a speech and language therapist, two times a week after school. Also, speech and language therapists come into the classroom to work with him. Reading remediation is provided once a week, ratio of 2:1, for a half hour. His reading group was 2:1, will temporarily be 8:1 since the teacher will be leaving because of pregnancy, then 3:1 in March. The second teacher, who is a special education teacher, will lead the class. The class work consists of teacher-made materials, with a lot of Orton-Gillingham materials. (Tr. at 153-155, 161)

She continued that Gilbert has difficulty writing, organizing and formulating thoughts. Writing is taught with three teachers. A computer is needed to minimize his frustration with writing since he enjoys working with a computer. (Tr. at 153, 156-157)

She indicated that she reviewed the goals on the IEP, and indicated that Gaynor could meet all the goals on the IEP. (Tr. at 158)

With respect to the recommended program, she indicated that the 15:1 ratio could he a bit overwhelming to Gilbert but is not too much of a change. Having just one teacher would be overwhelming to Gilbert. She indicated that Gilbert lacks self-confidence, is not very communicative with adults, and is very silly. (Tr. at 158-159)

His behavior has improved during the current school year and he has improved in decoding, comprehension, multiplication and division. (Tr. at 160) The ADHD manifests itself in the classroom, and he needs a lot of prompting to return to task. A small group is necessary to deal with the ADHD. (Tr. at 160-161)

She indicated that the last day of school was June 9th. On June 23rd, his teacher from last year. Ms. Shapiro, was in the hospital. Teachers are not required to be at the school after June 9th. (Tr. at 162-163)

On cross-examination, she indicated that, two weeks after school is over at Gaynor, there is a summer camp program which meets on the school steps and goes into the park. She indicated that a small class size is needed primarily due to Gilbert's learning disabilities since at instructional time he stays quiet. She indicated that since he is not used to learning in a bigger class, he would retreat and not volunteer as much. (Tr. at 163-164, 165-166) Also, since he's very impulsive and requires redirection, he would have difficulty with only one teacher in the class. (Tr. at 179)

Appendix C

In math, the functional levels in his group of five children range from 4.1 to 4.5. The reading levels in his group of eight children are 3.5 to 4.5, decoding, and third grade to 4.5, in comprehension. Gilbert is on the lower end "comprehension-wise" and therefore gets remedial reading, during which he is pulled out of class and misses "book club" where children read independently. (Tr. at 167-168)

When confronted with the fact that with respect to comprehension, the evaluator found that his skills had regressed from 1997-1998 to 1995-1999, she indicated that his comprehension skills do need a lot of guidance but indicated that any increased difficulty might have been due to the increased difficulty of the coursework. She indicated that she had seen progress in reading. When confronted with the fact that, with respect to math reasoning, the evaluator found that his skills had regressed from 1997-1998 to 1998-1999, she answered that she did not know about progress in the prior school year. She did indicate that his math level was 4.1. His reading level is a 3.5. (Tr. at 172-174, 176-177)

There is no opportunity to be with non-disabled peers at Gaynor. The school staff feels that Gilbert will be able to be mainstreamed within a few years, but with extra services. (Tr. at 174-175) She did not know who Iris Fruend is. (Tr. at 174-175, 178)

Ms. Keller, a speech and language pathologist at Gaynor, sees Gilbert once a week in a dyad, twice a week during his writing lesson and once for "language group." She indicated that he needs this level of speech and language involvement because he has receptive and expressive difficulties. With

respect to expressive language, his output is reduced, he is very non-specific. He has difficulty organizing his thoughts and ideas so that structure and guidance is necessary. With respect to receptive language, he needs instructions to be simplified or repeated. (Tr. at 229-231)

He has benefited from the involvement of Ms. Keller insofar as his assignments are improved. She coordinates these lessons with the teacher. (Tr. at 232)

On cross-examination, she indicated that she had not done any speech and language evaluations on Gilbert. (Tr. at 233-234) She indicated that the speech and language recommendation of the Board of Education, in a group of three, was not her preference because when there are three, you sometimes lose focus. (Tr. at 233-234, 240)

Ms. Miller testified that she is Gilbert's reading specialist. She works with him in a group of two. Gilbert's weaknesses lie in reading comprehension and in his understanding of language; he either doesn't understand or takes things too literally. To help with his comprehension problems, she is working on vocabulary development on such things as prefixes and suffixes. She indicated that he needs the additional reading assistance and is benefiting from it, mostly in decoding. (Tr. at 241-244, 246)

On cross-examination, she indicated that his in-class reading group is too big for him to get the intense instruction he needs because he's a very passive person. (Tr. at 247)

On further questioning, she indicated that he is taking more chances, say, in terms of making a prediction as to what will happen in a particular piece. (Tr. at 248)

The parent also made legal arguments on the record, mostly in regard to procedure. The parent argued the final notice should he sent during the school year so the parent might have an opportunity to actually view an example of the recommended program. Additionally, he argued that with respect to the timeliness of an annual review, a reasonableness standard should apply, and that this process, beginning in September 1998 and ending in August 1999, took too long. (Tr. at 133-134-135)

FINDINGS AND DECISION

The Board of Education may be required to pay for educational services obtained for a student by a student's parent if the services offered by the Board of Education are inadequate or inappropriate (prong one), the services selected by the parent are appropriate (prong two), and equitable considerations support the parent's claim (prong three), even if the private education sought by the parents lacks State approval. (*School Committee of the Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 [1985]; *Carter*) The Board of Education bears the burden of demonstrating the appropriateness of the program recommended by its CSE. (New York State Review Officer's Decision. No. 93-9) To meet its burden, the Board of Education must show that the recommended program is reasonably calculated to allow the child to receive educational benefits. (*Board of Education Hendrick Hudson CSE v. Rowley*, 458 U.S. 176 [1982])

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In this matter, much time has been devoted to dissecting the importance of the Board of Education's failing to have a special education teacher at the relevant CSE review on June 23, 1999.[1] The IDEA Amendments of 1997, however, are clear on this issue. The Amendments specifically required the IEP team to include "at least one special education teacher, or where appropriate, at least one special education provider *of such child*," (emphasis added) making clear that the child's actual special education teacher should be at the meeting (614[d][1][B][iii])

The requirement makes sense. It is hard to see how a group of even highly talented people could conscientiously make a determination about a child's educational program without the input of the person who has been most closely monitoring that child's educational progress over the course of the past year. The Board of Education argues that the failure to have the special education teacher at the CSE meeting can be excused because the special education teacher was not able to appear. However, the special education teacher was in fact ready to appear at a previous date when the Board

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1. It should be noted that the parent in this matter did testify that a teacher from Gaynor was at the CSE review, pointing to Iris Fruend as the teacher. However, I find that the parent was mistaken in this regard. A law student attending the review with the parent who took notes specifically remembered that the parent did not recognize anyone at the review. Moreover, Ms. Stakow, the teacher from Gaynor, did not recognize the name of Iris Fruend as a teacher from Gaynor. Finally, and most tellingly, the CSE Review rationale indicates that the "[r]eview team attempted to contact Stephen Gaynor School but were informed that there was no one who could participate in review." (Exh. 2)

of Education failed to bring a parent member and abruptly cancelled the meeting. Further, the case the Board of Education relies upon for the proposition that it can comply with its statutory obligation by designating its own teacher is outdated since it refers to regulations that pre-date the current IDEA Amendments. (New York State Review Officer's Decision, No. 96-18) The Board of Education should have been more careful to insure that the parent member attended the first review, especially given that the school year was about to end and that subsequent teacher unavailability was foreseeable.

The parent also raises significant substantive issues with the proposed program, in particular with respect to the levels in the class. Gilbert was deemed on a fourth grade level in math computation as of April, 1999, and yet the Board of Education deemed it appropriate to place Gilbert in a class where some children perform math at a kindergarten level (as measured in February 2000). The teacher sought to explain this discrepancy by indicating that the children work individually and then discuss their work in "circles," but it is not altogether clear what a higher functioning child would learn when kindergarten-level materials are being discussed in such circles. The teacher did mention that there is a child in such class with a math level akin to Gilbert's and that this child was mainstreamed into regular education (for math). However. It was not specifically indicated that Gilbert was to be mainstreamed for math. Nor was it satisfactorily explained how Gilbert could attend a fourth grade level math class in a school for gifted children, where, presumably, the pace of the work would be faster than usual and the ratio would be larger than Gilbert could handle. As a result, I find

the Beard of Education has not offered an appropriate program and that the parent has met his burden on "prong one."

Insofar as "prong two" is concerned, there was more than sufficient testimony that the program at Gaynor is suiting Gilbert's needs and providing him with an appropriate education.

The parent indicated that he had seen steady improvement at Gaynor, and his teacher indicated that he has improved in decoding, comprehension, multiplication, division, and also in regard to his behavior. The Board of Education argued that Gilbert did not progress in the 1998-1999 school year when comparing the evaluations from the 1997-1998 school year, but when comparing Gilbert's math and reading levels as tested in April 1999 to the curtail levels reported by his teacher there is evidence that progress has been made. For instance, in reading comprehension Gilbert's level was reported as mid-second grade as of April 1999; as of February 2000, his level was 3.5. (*see* Gaynor progress report. Exh. 1 at 3) This progress can be traced to the thorough reading program at Gaynor, which includes an additional reading teacher and a speech and language therapist who works on skills that are applicable to reading. As a result, I find that the parent has met his burden on "prong two."

In regard to equities, the parent did everything asked of him by the Board of Education in regard to this matter. Though the parent did not seem to have particular interest in the public school site in question the law does not require the parent to be fully committed to public school before

allowing an award of reimbursement. (*See* New York State Review Officer's Decision. No 96-53: though parent made no secret of preference to keep child in private school, reimbursement awarded). Accordingly, I find the parent is entitled to reimbursement under *Carter*.

ORDER

In view of the foregoing, the Board of Education is hereby ordered to reimburse Gilbert's parents for the cost of tuition for the 1999-2000 school year upon presentation by the parent of proof of payment. Such proof is to be submitted directly to the Board of Education.

Dated: April 6, 2000

s/ Michael Lazan
MICHAEL LAZAN, ESQ.
Impartial Hearing Officer

PLEASE TAKE NOTICE

Within 30 days of the receipt of this decision, the parent and/or Board of Education has a right to appeal the decision to the State Review Officer of the New York State Education Department under Section 4404 of the Education Law and the Individuals with Disabilities Education Act. Failure to file the notice of intention to seek review is a waiver of the right to appeal this decision.

Directions and forms for filing an appeal are included with this decision.

DOCUMENTATION ENTERED INTO RECORD JANUARY 21, 2000

~~1.~~	C-10 Form, 07/29/99, 1 p.	Board of Education
~~2.~~	CSE Review, 06/23/99, 1 p.	Board of Education
3.	IEP, 6/23/99, 21 pp.	Board of Education
~~4.~~	M-2 Meeting Notice for EPC/CSE Review. 05/18/99, 1 p.	Board of Education
~~5.~~	Social History Report, 07/02/98, 3 pp.	Board of Education
~~6.~~	Occupational Therapy Assessment, 04/22/99, 1 p.	Board of Education
~~7.~~	Speech and Language Evaluation, 09/25/98, 15 pp.	Board of Education
~~8.~~	Specch and Language Evaluation, 04/30/99, 3 pp.	Board of Education
~~9.~~	Psychological Report, 04/10/99, 6 pp.	Board of Education
~~10.~~	Classroom Observation, 01/28/99, 1 p.	Board of Education

~~11.~~	Educational Evaluation Report, 04/10/99, 7 pp.	Board of Education
~~12.~~	Progress Report, '98-'99, 16 pp.	Board of Education
~~13.~~	M-2 Meeting Notice for EPC/CSE Review, 05/18/99, 1 p.	Board of Education
~~14.~~	Medical Documentation Form. 04/23/99, 2 pp.	Board of Education

DOCUMENTATION ENTERED INTO RECORD JANUARY 31, 2000

A.	Notes, Undated, 2 pp.	Parent

DOCUMENTATION ENTERED INTO RECORD FEBRUARY 28, 2000

L.	Progress Report, '99-'00, 16 pp.	Impartial Hearing Officer

APPENDIX D — VERIFIED PETITION, DATED MAY 16, 2000

OFFICE OF STATE REVIEW
NEW YORK STATE EDUCATION DEPARTMENT

In the Matter of Appeal of

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK

Petitioner,

From a Hearing Officer's Finding of Fact and Decision Issued in the Matter of

GILBERT FRESTON, by his parent, TOM FRESTON,

Respondent

VERIFIED PETITION

Introduction

1. The parent initiated an impartial hearing seeking to obtain tuition reimbursement for the 1999-2000 school year, in accordance with the decision of the United States Supreme Court in *Florence County School District Four v. Carter*, for the unilateral placement of the student in the Stephen Gaynor School ("Gaynor"), a private, non-SED approved program.

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2. Gilbert, born on October 1, 1989, has never attended a public school program.

3. For the 1999-2000 school year, the Committee on Special Education ("CSE") developed an Individualized Education Program ("IEP') for Gilbert, which recommended that he be classified learning disabled and receive special education services in a Modified Instructional Service ("MIS") 1 program with a student/ teacher ratio of 15:1.

4. The recommended placement was at P.S. 77[1] (the New York City Lower Lab School for Gifted Education), which is a public school located in Manhattan. However, Gilbert's parent continued to unilaterally place Gilbert at Gaynor for the 1999-1000 school year.

5. The impartial hearing officer held that the recommended placement was not appropriate for Gilbert for the 1999-2000 school year and that the unilateral private school placement at Gaynor was appropriate and the least restrictive environment.

6. The Impartial Hearing Officer's Findings of Fact and Decision ("Decision") should be reversed in its entirety.

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1. The public school number designation changed from P.5. 871 to P.S. 77 as of the 1999-2000 school year.

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As And For A Statement Of Relevant Facts

7. Petitioner, the Board of Education of the City School District of the City of New York ("Board"), is a municipal corporation, created pursuant to Article 52-A of the New York State Education Law.

8. The Board, in accordance with the Individuals With Disabilities Education Act ("IDEA") and Article 89 of the New York State Education Law is responsible for providing a free appropriate public education ("FAPE") to New York City resident students, between the ages of 3 and 21, who have been classified as children with disabilities in need of special education programs and services.

9. Respondent, Tom Freston, is the parent of the student Gilbert Freston. (sometimes referred to as "the student") who has been classified by the CSE as a child with learning disability in need of a MIS 1 program combined with the related services of speech and language, and counseling. (Board Exhibit 3)

10. The parties have stipulated as to the appropriateness of the classification of learning disabled. (Decision at 2)

11. Gilbert, born on October 1, 1989, has attended Gaynor since kindergarten. Before attending Gaynor, Gilbert's only other school experience was in the Washington Market School, a small pre-kindergarten private school. (1/31/00 Tr. at 127-129)

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12. In preparation for annual review for the 1999-2000 school year, the CSE conducted several updated evaluations, obtained current progress reports from Gaynor and reviewed existing evaluation reports.

13. On July 2, 1998, a social history was conducted. The parent reported that Gilbert takes Ritalin twice daily all year round. He further reported that Gilbert receives language therapy after school two times a week. The parent believes that Gilbert's problems center around his reading and distractibility. (Board Exhibit 4)

14. On September 25, 1998, a speech and language evaluation was conducted by the same evaluator who conducted the prior year's speech and language evaluation. Before testing began, Gilbert said that he did not take his medication that day, however, his mother reported that he did. During the evaluation, Gilbert had poor attention skills and was extremely overactive, restless and easily distracted. He also appeared tired and yawned often during the evaluation. The evaluator opined that these issues affected the results of Gilbert's testing. (Board Exhibit 7)

15. The evaluator reported that the assessments revealed variable linguistic functioning in receptive and expressive language abilities ranging from above average to mildly deficient and below average respectively. The evaluator recommended that speech and language services continue twice weekly in a group of three students. (Board Exhibit 7)

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16. On January 28, 1999, a classroom observation was conducted. The class was a reading class with six children with one teacher and one assistant teacher. Gilbert entered from another class and although he did not have his homework sheet, he shared with another student. Gilbert participated in the activities of the lesson and was attentive when the other students were reading. There were no attention issues or restlessness noted by the observer. (Board Exhibit 10)

17. On April 10, 1999, an educational evaluation was conducted. The educational evaluator reported that the student was cooperative and friendly. He appeared to be tired and yawned several times. This evaluator reported that there were a few moments of distractibility, however, Gilbert was easily re-directed back onto task. (Board Exhibit 11)

18. The K-TEA was administered. The student's decoding skills were assessed at the middle 3rd grade level and spelling was at the middle to upper 3rd grade level. In reading comprehension, he scored at the middle 2rd grade level. In math applications he scored at the middle 3rd grade level and in math computation he scored at the early 4th grade level. (Board Exhibit I 1)

19. Also on April 10, 1999, a psychological evaluation was conducted. The evaluator reported that Gilbert was cooperative and compliant. He appeared to be tired and benefited from breaks. Be also responded well to praise and encouragement. (Board Exhibit 9)

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20. The student scored overall in the upper end of the average range of intelligence with his verbal scale score in high average range. On the Bender Visual Motor Gestalt Test, Gilbert scored below average in the area of graphomotor and fine motor coordination. Some of his drawings indicate rotation joining difficulties and poor organization. (Board Exhibit 9)

21. Emotional testing demonstrated that Gilbert needs a lot of encouragement and praising. Continued counseling services were recommended to address self-confidence and self-esteem. (Board Exhibit 9)

22. On April 22, 1999, an occupational therapy assessment was conducted. The results demonstrated no areas of weakness. The evaluator determined that occupational therapy was not needed. (Board Exhibit 6)

23. On April 23, 1999, a medical examination was conducted which found no medical issues other than Gilbert's diagnosis of Attention Deficit Disorder. (Board Exhibit 14)

24. On April 30, 1999, a speech and language evaluation was conducted. This evaluation demonstrated that Gilbert presents with normal expressive and receptive language skills. The only area noted to be in the low average range was in the area of sentence assembly, however, with cued words he was able to formulate complex sentences. This evaluator did not recommend speech and language services. (Board Exhibit 8)

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25. A 1998-1999 mid year report from Gaynor was submitted and reviewed by the CSE. It showed Gilbert to be functioning at approximately an early 2nd grade level in independent reading and middle 2nd grade level in instructional reading. His reading comprehension was at approximately the middle 2nd grade level while his listening comprehension skills were at approximately a late 2nd grade level and spelling was at approximately a middle 2nd grade level. (Board Exhibit 12)

26. The Gaynor mid year report indicated that Gilbert was at approximately the early 3rd grade level in math. No deficits were noted in the area of perceptual functioning. In the area of following directions, it was noted that Gilbert followed directions with ease when focused. Gilbert's listening skills were also good when he was focused. With respect to oral language and communication, it was noted that Gilbert exhibited word retrieval difficulties and can be disorganized in his language. (Board Exhibit 12)

27. A CSE meeting was initially scheduled for May 28, 1999. However, due to the unavailability of the parent member, the meeting was rescheduled to June 23, 1999. (Board Exhibit 13 and 1/31/00 Tr. at 139-142)

28. On June 23, 1999, a CSE meeting was held for the purpose of recommending an appropriate education placement for the 1999-2000 school year. In attendance were the parent, district representative, general education teacher, law clerk from the office of parent's

attorney, special education teacher, parent member, and school psychologist. (Board Exhibit 3)

29. The CSE determined that the student required a MIS 1 program, which is a self-contained special class setting with a ratio of a maximum of 15 students to 1 teacher, combined with testing modifications, speech and language services twice weekly, and counseling services one time a week. (Board Exhibit 3)

30. The CSE attempted to contact the special education teacher from Stephen Gaynor, but was informed that there was no one who could participate in the review. (1/21/00 Tr. at 20)

31. A placement at P.S. 871 located at 1700 3rd Avenue, New York, New York, was offered by Final Notice of Recommendation sent to the parent on July 29, 1999. (Board Exhibit 1) The name of the school changed in the 1999-2000 school year from P.S. 871 to P.S. 77. It is also called the New York City Lower Lab School for Gifted Education. (2/29/00 Tr. at 199)

32. The parent unilaterally placed the student at Gaynor for 1999-2000 school year.

33. Thereafter, the parent requested an impartial hearing. The hearing was held on January 21, 2000, January 31, 2000 and February 29, 2000. (Decision at 1)

34. The Board was represented by an attorney and presented testimony from the Special Education Teacher of the

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MIS 1 program at P.S. 77, the CSE School Psychologist who conducted the classroom observation, and the CSE Special Education Teacher.

35. The parent was represented by an attorney and presented testimony from three Gaynor teachers, himself, and the attorney's law clerk who attended both scheduled CSE meetings.

36. The psychologist who participated in Gilbert's IEP review for the 1998-1999 school year as well as the 1999-2000 school year, and conducted the classroom observation testified in support of the CSE recommendation at the hearing. (1/21/00 Tr. at 8-9)

37. The psychologist testified that the results of the evaluation showed a child who is friendly, pleasant and on the quiet side. With respect to the intellectual testing, Gilbert demonstrated relative strengths in the area of verbal abstract reasoning and general fund of information and being able to sequence. There were no relative weaknesses. (Board Exhibit 9, 1/21/00 Tr. at 9-10) With respect to perceptual motor development, Gilbert scored below average. With respect to the emotional testing, Gilbert demonstrated need in the area of self-confidence and self-esteem and that he has difficulty verbalizing his feelings. (1/21/00 Tr. at 10)

38. The CSE psychologist further testified that the findings of the psychological evaluation were consistent with the Gaynor mid year teacher report. (1/21/00 Tr. at 12)

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39. He further testified with respect to the classroom observation. Overall Gilbert participated in the class activities, he was appropriate in the group and seemed to be very attentive to what was going on in the class. (1/21/00 Tr. at 16 and 41-44)

40. He testified that Gilbert needed a self-contained class where his issues of attention and academic weaknesses could be address. In addition, counseling was recommended to address issues of self-confidence and self-esteem. (1/6/00 Tr. at 21-22)

41. The educational evaluator who participated at the CSE review in the capacity of the special education teacher member testified at the hearing in support of the CSE recommendation of a MIS 1 program.

42. The CSE special education teacher member testified that she holds a New York State certification to teach special education and reading. She has a Bachelor of Arts with a concentration in education and a Masters Degree in the field of education with a concentration in the area of reading. (1/21/00 Tr. at 58-59)

43. She testified that she has expertise in the types of instruction children with disabilities need and in decision regarding an appropriate placement. (1/21/00 Tr. at 100)

44. At the hearing, she testified that Gilbert's presenting problem is most prominent in the area of reading, particularly reading comprehension. Math was an area

of strength, especially in numeric calculations; however, he had some difficulty in the area of problem solving. (1/21/00 Tr. at 60-66)

45. The special education teacher opined that the results of the educational evaluation were similar to information provided in the teacher report from Gaynor. (1/21/00 Tr. at 66) In addition, the teacher report from Gaynor described Gilbert as having attention issues. It was noted that his work improves when he is focused. Also the teacher report noted that Gilbert was not very verbal. (1/21/00 Tr. at 66-68)

46. The special education teacher member testified that although the speech and language evaluation recommended no services, the team was concerned about the results of some of the sub tests of the evaluation. Gilbert's scores were low in the area of listening comprehension and oral narrative. Both are of these skills are important in a classroom setting, therefore the CSE team recommended speech and language services. (1/21/00 Tr. at 69-71)

47. In her opinion, a MIS 1 program would be appropriate to meet Gilbert's learning disability and attention issues because the special education teacher would use multi sensory methods of instruction. She opined that Gilbert needs the smaller class size with a trained special education teacher to address his attention issues. (1/21/00 Tr. at 73-74)

48. She further opined that a self-contained private school would have been too restrictive because there is no reason why Gilbert could not be with non-disabled peers during non-academic activities. (2/1/00 Tr. at 83-84)

49. The special education teacher of the recommended MIS 1 class at P.S. 77 testified on behalf of the Board in support of the appropriateness of the recommended MIS 1 program for the student.

50. The teacher testified that she is certified in the areas of elementary education and special education. She has taught special education for about five years. She is familiar with Gilbert through a review of his IEP. (2/29/00 Tr. at 198) The school is large with two schools within one building. The smaller school is P.S. 77, which contains kindergarten through fifth grade classes. There is only one MIS 1 class in the school and there are other special education services in the school such as consultant teacher services. The MIS 1 class is located next to and across the hall from two general education fourth grade classes. (2/29/00 Tr. at 199-200)

51. There are nine students currently in her class with one teacher and a student teacher from New York University. The children are between the ages of about nine and ten years old with one child who is eight years old. (Tr. at 200-201).

52. The functioning levels of the students in reading range from about high kindergarten level to high third grade. The functioning levels of the students in math range

from about high kindergarten to fourth grade. (2/29/00 Tr. at 202 and 218)

53. To address the range of reading levels the teacher practices private reading and has individualized reading groups based upon the students' instructional reading levels. The reading program is a balanced literacy program, which includes read aloud, interactive writing, shared reading, guided reading, and writer's workshop. Most of these activities happen daily. (2129/00 Tr. at 203-204)

54. In math, the majority of the students are functioning between the 2nd and 3rd grade level, with one child functioning at the fourth grade level. Be is currently mainstreamed for math. The class participates in the math curriculum, which is a hands-on curriculum called the Turk program. The children work in pairs or they work independently to solve problems. The students meet in a circle to discuss strategies used and different strategies available in solving problems. The class also did a unit on telling time, as this was an area of need for the class. (2/29/00 Tr. at 202, 206 and 218-220)

55. The MIS 1 teacher testified that the students have similar needs as Gilbert including needing speech and language and counseling services. (2129/00 Tr. at 207-208)

56. The MIS 1 teacher testified that based upon her review of Gilbert's IEP, it is her opinion that she would have had an appropriate placement for him for the 1999-2000 school year. (2/29/00 Tr. at 211)

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57. The speech and language pathologist from Gaynor testified that Gilbert has expressive and receptive delays requiring speech and language services. (2/29/00 Tr. at 229-230)

58. On cross examination, the Gaynor speech and language pathologist admitted that she never conducted a speech and language evaluation nor seen any speech and language evaluation conducted by the CSE. (2129/00 Tr. at 233-234)

59. The Gaynor reading teacher testified that Gilbert has difficulty with reading comprehension and that she provides reading sessions in a group of two once a week. It is her opinion that Gilbert needs this level of reading services (2/29/00 Tr. at 242-243)

60. The Gaynor head teacher of Gilbert testified that Gilbert's class consists of eight students, all boys with one teacher and an assistant. (1/31/00 Tr. at 148-150) In her opinion the IEP is "on target" and Gaynor is addressing Gilbert's needs and goals as described in the IEP. However, with respect to the class size of 15 to 1, she opined that the class would be overwhelming for Gilbert partly because it takes him a long time to warm up and trust any teacher. (1/31/00 Tr. at 158)

61. She further testified that Gilbert's teacher was in the hospital on June 23, 1999, the day of the IEP meeting. (1/31/00 Tr. at 162)

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Impartial Hearing Officer's Decision

62. The impartial hearing officer held that the recommended MIS 1 placement was not appropriate to meet Gilbert's educational needs and ordered the Board to reimburse the parent for the cost of the tuition at Gaynor for the 1999-2000 school year.

63. The impartial hearing officer based his determination that the MIS 1 program and placement was not appropriate on two findings: (1) he found the IEP to be defective procedurally because Gilbert's actual special education teacher from Gaynor did not attend the IEP review meeting held on June 23, 1999; and (2) he found that Gilbert's functioning level in math is too high for him to be appropriately grouped in the recommended class.

As And For A First Affirmative Claim

The Decision Should Be Reversed On The Grounds That There is Substantial Evidence to Establish That The Recommended MIS 1 Program Was Appropriate To Meet The Student's Educational Needs

64. A parent who unilaterally places his or her child in a private non-SED approved school may be entitled to tuition reimbursement if the public school district did not offer an appropriate placement. Such a public placement is appropriate if it is reasonably calculated to enable [the student] to receive educational benefits. *Bd of Ed. Hendrick Hudson CSE v. Rowley*, 458 U.S. 176 (1982) ("*Rowley*")

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65. The Individuals with Disabilities Education Act ("IDEA") "guarantees . . . an 'appropriate' education, not one that provides everything that might be thought desirable by loving parents.'" *Walczak v. Florida Union Free Sch. Dist.* 142 F.3d 119, 131 (2d Cir. 1998) (quoting *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.3d 563, 567 (2d Cir. 1998).

66. The evidence introduced at hearing established that the recommended MIS 1 program, combined with the related services of speech and language and counseling, would have been appropriate for Gilbert for the 1999-2000 school year.

A. *The IHO's Determination That The IEP Meeting Was Not Properly Constituted Rendering The Entire Recommendation A Nullity Is Incorrect.*

67. The Board cannot compel a child's private school teacher to attend an IEP meeting. Accordingly, the Board may designate a teacher to participate in the child's IEP meeting to act in the capacity of the special education teacher member if such teacher is qualified to provide special education in the area of the child's disability. *Application of a Child With a Disability*, State Review Officer Appeal No. 96-18 ("SRO 96-18").

68. The IHO incorrectly found that this SRO decision is no longer valid on the grounds that it predates revisions made to the composition of the IEP team by the 1997 reauthorization of the Individuals with Disabilities Education Act ("IDEA"). Those revisions do not affect the continued validity of SRO 96-18.

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69. First, a review of the 1997 revision of the requirement for the participation of a special education teacher as a member of the IEP team does not indicate that the requirement has been altered, in any substantive way, from that which existed prior to the reauthorization.

70. Secondly, the revision does not preclude the application of SRO 96-18, for reason that it does not vitiate the underlying rationale for the SRO's determination.

71. Although the private school teachers are regularly invited to, and do participate, at IEP review meetings, they have no legal obligation to attend and can absent themselves for any reason and without prior notice.

72. To hold that their participation is absolutely required places the conduct of any IEP meeting within their control. This, as recognized implicitly by the SRO, cannot be the intent of the IDEA. In fact, it is clear that the IDEA places responsibility for the day-to-day operation of IEP meetings within the control of the local education agency. 34 CFR §300.344(a)

73. Furthermore, it is unreasonable to require **without exception** the presence of the child's actual special education teacher at the IEP meeting.

74. The efficient and appropriate conduct of IEP meetings concerning students who attend private schools requires a reasonable alternative means of complying with the procedural requirement of ensuring the participation of a special education teacher.

75. In the case at hand, the CSE contacted Gaynor but was informed that there was no one available to participate in the review, presumably because the school is closed during the summer.

76. In addition, it was later learned at the hearing that the Gaynor teacher was in the hospital at the time of the IEP meeting. Therefore, whether or not Gaynor was in session during the summer, the teacher was unavailable to participate in the IEP review meeting.

77. Under the circumstances, it was reasonable and appropriate for the CSE to designate a special education teacher qualified to teach in the area of the child's disability to participate at Gilbert's IEP meeting in the capacity of special education teacher member.

78. Based upon the foregoing reasons, the IEP meeting was properly constituted and procedurally compliant with the provisions of the IDEA.

B. *The Testimony Of The Special Education Teacher Of The Recommended MIS 1 Program Established That The Functional Grouping Of The Recommended Class Was Appropriate To Meet the Student's Educational Needs.*

79. With respect to the impartial hearing officer's determination that the proposed MIS 1 program would not have been challenging academically, the special education teacher of the prospective MIS 1 program provided sufficient evidence as to how Gilbert's academic needs would have been addressed.

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80. In general, the proposed MIS 1 class contains nine students with one special education teacher (in addition, a student teacher from New York University is present three days a week). The majority of students are nine to ten years old, and one student is eight years old.

81. Specifically, the hearing officer incorrectly determined that the functioning levels of the students in the area of math were too dissimilar to Gilbert's level, making the class inappropriate for Gilbert.

82. The MIS 1 teacher testified that in math, the students' functioning levels range from high kindergarten to third grade, with one child functioning at the fourth grade level who is mainstreamed for math in a general education class.

83. The MIS 1 teacher testified that the majority of the students are functioning at the second to third grade levels in math.

84. Contrary to the hearing officer's description of Gilbert's functioning level in math, Gilbert scored in the middle third grade level in math applications and the early fourth grade in math computation. Therefore, Gilbert's overall math score is approximately at the high third grade level.

85. Based upon his overall functioning level in math, Gilbert would be within the range of the majority of the students in math.

86. The MIS 1 teacher testified that based upon her review of Gilbert's IEP, she feels that academically Gilbert would fall at the higher end of her class, but that there are students who are at his academic level in her class.

87. She further opined that her class is an appropriate placement for Gilbert.

88. In addition, the hearing officer incorrectly presumed that because the school is called the New York Lower Lab School for Gifted Education, there would be no appropriate opportunity for mainstreaming for Gilbert in math.

89. The MIS 1 teacher testified that the child in her class who is functioning at the fourth grade level in math currently is mainstreamed for math in the general education program. If appropriate, such an approach in math would also be available for Gilbert in the recommended placement.

90. Contrary to the hearing officer's presumption, the MIS 1 teacher specifically testified on cross examination that despite the school being called the Lower Lab School for Gifted Education, the general fourth grade class is doing fourth grade level work.

91. She testified that the education is gifted in that in math the school uses the "Turk" program, which is a hands-on approach where students discuss their strategies for math, but that the fourth grade work is the same as a general education fourth grade work district-wide. The

hearing officer's presumption that the pace of the work would be faster than usual is unsupported by the evidence.

92. For the foregoing reasons, the hearing officer's decision should be reversed in its entirety.

As And For A Second Affirmative Claim

As A Matter Of Equity, The Tuition Reimbursement Should Be Denied On the Grounds Thai The Parent Had No Intention Of Placing Gilbert In A Public School Program Irrespective Of Its Appropriateness.

93. Effective on or about June 1, 1997, the Individuals with Disabilities Education Act ("IDEA") was reauthorized. Added to the IDEA was a provision that specifically addressed a parent's right to seek tuition reimbursement from a private school. 20 U.S.C. §1412(a)(10)(C)(ii) and (iii).

94. The newly enacted provision specifically limited tuition reimbursement to "parents of a child with a disability, **who previously received special education and related services under the authority of a public agency**." 20 U.S.C. §1412(a)(10)(C)(ii) (emphasis supplied).

95. The language of the new IDEA clearly presumes that the child attended a public school special education program.

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96. Further, the Supreme Court in *Burlington/Carter* established a tripartite test that included a review *of* equitable considerations prior to an award of tuition reimbursement.

97. The hearing officer found that the parent "did not seem to have particular interest in the public school site in question." (Decision at 13)

98. Here, we contend that the student never received special education service by a public agency and that the parent had no intention of placing Gilbert in a public school program.

99. Accordingly, an award of tuition reimbursement, as a matter of equity, should be barred.

Wherefore, for the foregoing reasons the Board respectfully requests that the Decision be reversed in its entirety and a determination be made that the Board's recommended placement for the 1999-2000 school year was appropriate.

Dated: May 16, 2000

Respectfully submitted,

Alexandra Michalos, Esq.
110 Livingston Street, Rm. 920
Brooklyn, New York 11201
(718) 935-3611

APPENDIX E — VERIFIED ANSWER, DATED AUGUST 30, 2000

STATE REVIEW OFFICER
NEW YORK STATE EDUCATION DEPARTMENT

In the Matter of the Appeal of

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

From a Hearing Officer's Findings of Fact and Decision issued in the matter of

GILBERT FRESTON, by his parent, TOM FRESTON,

Respondent.

Respondent, Tom Freston by his attorney, NEAL H. ROSENBERG, hereby answers the verified petition and respectfully alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations sat forth in paragraph "1" of the petition.

2. Admits the allegations contained in paragraphs "2", "3", "4" and "5" of the petition.

3. Denies the allegations contained in paragraph "6" of the petition.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs "7", "8", "9" and "10" of the petition.

5. Denies the allegations contained in paragraphs through "11" through "61" of the petition and respectfully refers the State Review Officer to the exhibits entered and the transfer of the hearing for a complete record.

6. Admits the allegations contained in paragraphs "62" and "63" of the petition and respectfully refers the State Review Officer to the Impartial Hearing Officer's decision fax the full meaning thereof.

7. Denies the allegations contained in paragraphs "64" borough "78" of the petition.

8. Denies the allegations set forth in paragraphs "79" through "92" of the petition and respectfully refers the State Review Officer to the exhibits entered and the transcript of the hearing for a complete record.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs "93" through "99".

10. Petitioner alleges that the Impartial Hearing Officer properly determined that the placement offered by the Board of Education was both procedurally and substantially inappropriate to offer an educational benefit to the child.

11. Petitioner alleges that the I.E.P. was not sufficiently specific and that the goals were net appropriately measurable.

Appendix E

12. Petitioner alleges that the Respondent Acted in good faith throughout the process end demonstrated the appropriateness of reimbursement as the appropriate remedy.

13. Petition alleges that the CSE meeting was invalid in that the goals were written in advance of the meeting and were not reviewed at the meeting.

14. Petitioner alleges that the review process must have some semblance of a timeline.

15. Petitioner alleges that the Board of Education must have a teacher familiar with the child at the meeting if at all possible and in this case the teacher's inability to attend was caused solely by the Petitioner's delay.

16. Petitioner alleges that the children in a Board of Education class must function within a three year age span.

17. Petitioner alleges that the testimony of the child's teacher, the school's speech and language pathologist and the reading specialist detail the needs and resultant techniques utilized so that as appropriate educational benefit is received by the child.

18. Petitioner alleges that his son requires the intense structured remediation he receives in reading, math and speech and language.

19. Petitioner alleges that his child requires and receives the use of a computer because of his frustration in writing.

This being especially relevant in light of the fact that although the Petitioner's education evaluation recommended giving the child the use of a computer. However, this recommendation was ignored by the committee because it was not allegedly corroborated by the occupational therapist or the teacher.

20. Petitioner alleges that his child's ADHD requires a small class/small school environment.

21. Petitioner alleges that the progress his child has made at the Gaynor School is clearly measurable. (T. pp. 130-131)

22. Petitioner alleges that both on procedural as well as substantive grounds the Petitioner's demand for a reversal of the impartial hearing officer's decision should be denied and that in light of Gilbert's need for small classes and individualized attention, Gaynor was an appropriate educational environment for him and he received an educational benefit.

Therefore, the decision of the hearing officer should be upheld in all respects.

Dated: New York, New York
August 30, 2000

Appendix E

Respectfully submitted

NEAL HOWARD ROSENBERG
Attorney for Respondent
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(212) 732-9450

To: BOARD OF EDUCATION OF THE
CITY OF NEW YORK
LAW DEPARTMENT
110 Livingston Street
Brooklyn, New York 11201

APPENDIX F — DECISION OF THE STATE REVIEW OFFICER, DATED MARCH 30, 2001

UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
STATE REVIEW OFFICER

No. 00-031

Application of the BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

Hon. Michael D. Hess, Corporation Counsel, attorney for petitioner, Alexandra Michalos, Esq., of counsel

Neal H. Rosenberg, Esq., attorney for respondent

DECISION

Petitioner, the Board of Education of the City School District of the City of New York, appeals from an impartial hearing officer's decision which ordered it to reimburse respondent for the cost of his son's education at the Stephen Gaynor School (Gaynor) for the 1999-2000 school year. The appeal must be dismissed.

Respondent's son was ten years old and in the equivalent of the fifth grade at Gaynor at the time of the hearing. He

has attended Gaynor since kindergarten. Gaynor has not been approved by the New York State Education Department to provide education to children with disabilities. The record is limited with respect to the student's history with petitioner's Committee on Special Education (CSE), but does indicate that the student has been classified by the CSE as learning disabled. His classification is not in dispute in this proceeding.

A speech/language evaluation was conducted in September 1998 when the student was in the fourth grade and nearly nine years old (Exhibit 7). Based upon a July 1998 social history (Exhibit 5), the speech/language pathologist noted that the boy took Ritalin twice per day. Although he had reportedly taken his morning dose of Ritalin prior to the evaluation, the student nevertheless exhibited poor attending skills and a short attention span during the evaluation. The evaluator reported that the boy's significant attention problems affected his ability to perform, even with frequent breaks to accommodate his behavior. The speech/language pathologist further reported that the student's linguistic functioning ranged from below average to significantly above average. When he was not focused and not attending, the student had difficulty organizing, integrating and remembering stimuli presented orally. The speech/language pathologist noted that the student's performance was above average when information was concrete and pictorial clues were provided. However, as the information became more complex and visual clues were not supplied, the student's attending skills deteriorated and his performance weakened. The student's expressive language skills were variable. He demonstrated difficulty in planning and producing sentences

for conversation and narratives. He also had difficulty organizing his thoughts in a logical precise manner. The speech/language pathologist recommended that the student receive speech/language therapy twice per week for 30 minutes.

In a 1998-99 midyear progress report, Gaynor reported that the student's reading comprehension and spelling skills were at approximately a 2.5 grade level and his mathematics skills were at a 3.0 grade level (Exhibit 12). The progress report also revealed that the student performed best on writing tasks when structure was provided. The student was described as not being particularly verbal because he preferred to use gestures or actions to communicate. He also exhibited word retrieval difficulties, and was disorganized in his language. The report further indicated that the student sometimes became silly, and had difficulty transitioning from free time to an academic activity.

One of petitioner's school psychologists observed the student in his reading class in January 1999 (Exhibit 10). The student was able to respond to questions about a book the class was reading. He also was able to read a passage aloud, although he had difficulty with two words. The school psychologist noted that the student actively participated during the entire period and was attentive when his classmates were reading.

In an educational evaluation conducted on April 10, 1999 (Exhibit 11), the student achieved grade equivalent scores of 2.5 for reading comprehension, 3.5 for reading decoding, 3.7 for spelling, 4.2 for math computation, and 3.6 for math

application on the Kaufman Test of Educational Achievement (KTEA). The educational evaluator noted that the student's greatest skill deficit was in reading comprehension and she recommended teaching the student more strategies and providing practice through drills and repetition to make reading a more fluent activity. On an informal writing sample, the student's writing was labored and simple. He did not use descriptive or enriched vocabulary. The educational evaluator suggested the use of a computer to increase productivity. She also suggested that the student maintain a daily log to increase his vocabulary, sentence construction and idea development.

A psychological evaluation was conducted on April 10, 1999 (Exhibit 9). The student achieved a verbal IQ score of 110, a performance IQ score of 104, and a full scale IQ score of 107 on the Weschler Intelligence Scale for Children – III (WISC-III), placing him in the upper end of the average range of intellectual functioning. The student's graphomotor and fine motor functioning were below average. Projective testing revealed that he was very sensitive, sometimes fragile, and had difficulty verbalizing his feelings. The psychologist noted that the student required much encouragement and praise in order to perform successfully at his intellectual potential. He recommended that a speech/language evaluation be conducted. He further recommended that the student remain in counseling to build his self-confidence and self-esteem.

An occupational therapist who assessed the student on April 22, 1999 reported that he did not need therapy (Exhibit 6). A speech/language pathologist who evaluated the student on April 30, 1999 recommended that he not receive therapy (Exhibit 8). She noted that although the student had exhibited

some difficulty responding to questions based on orally presented paragraphs and sentence assembly, his expressive and receptive language skills were in the normal range. A medical documentation form completed in April 1999 indicated that the student had been diagnosed as having an attention deficit disorder (Exhibit 14).

The CSE was initially scheduled to meet on May 28, 1999. However, the meeting was postponed because the parent member was unavailable. The CSE reconvened on June 23, 1998. No one from Gaynor was available to participate at the meeting, however, one of petitioner's educational evaluators was designated to serve as the special education teacher member of the CSE. The CSE developed an individualized education program (IEP) for the student for the 1999-2000 school year (Exhibit 3). It recommended that he continue to be classified as learning disabled, and that he be placed in a modified instructional services – 1 (MIS-I) program with a student : teacher ratio of 15:1. The CSE further recommend that the student receive speech/ language therapy in a group twice per week and counseling in a group once per week. A final notice of the CSE's recommendation was sent to respondent on July 29, 1999, in which the boy's parent was offered a specific placement at PS 871, which is also called the New York City Lower Lab School for Gifted Education (Exhibit 1). The record shows that the school's designation changed from PS 871 to PS 77 commencing the 1999-2000 school year.

Respondent disagreed with the recommended placement, and requested an impartial hearing. The hearing was held on January 21, 31 and February 29, 2000. The hearing officer

rendered his decision on April 6, 2000. He determined that the CSE was invalidly composed because the student's special education teacher from Gaynor was not present at the June 23, 1999 meeting. Additionally, the hearing officer questioned whether the student would have been appropriately grouped for math in the proposed MIS-I program. He also questioned whether mainstreaming the student for math was considered as an alternative, and whether it was a viable option. The hearing officer concluded that petitioner had failed to offer an appropriate program, and that Gaynor had provided an appropriate program to the student. Accordingly, the hearing officer found that respondent was entitled to an award of tuition reimbursement.

The Board of Education appeals from the hearing officer's decision on several grounds. Initially, it argues that the hearing officer incorrectly determined that the CSE was improperly constituted, thereby nullifying its recommendation for the student's program and placement during the 1999-2000 school year. The Board of Education asserts that when a parent has placed his child in a private school, it is not required to have a teacher from that school participate in the student's IEP meeting as the student's special education teacher. Instead, it argues that it may designate one of its educational evaluators to serve as the student's special education teacher at the meeting, if the evaluator is qualified to provide special education in the area of the student's disability.

The Board of Education relies upon the decision in *Application of a Child with a Disability,* Appeal No. 96-18. The hearing officer found that the decision upon which the

Board of Education relies was no longer controlling because it had been premised upon a footnote to the former 34 C.F.R. § 300.344. That regulation was replaced in May 1999 by the new regulations implementing the Individuals with Disabilities Education Act Amendments of 1997 (IDEA '97). I agree with the hearing officer that the regulation in question has been superseded by the May 1999 regulations. However, I disagree with his conclusion that the 1997 amendments to the IDEA or their implementing regulations require that the student's special education teacher at the private school attend the IEP meeting.

The IDEA '97 requires that at least "one special education teacher, or where appropriate, at least one special education provider of such child" participate in the meeting at which the student's IEP is developed (20 U.S.C. § 1414[d][1][B][iii]). The implementing regulation requires that an IEP team include at least "one special education teacher of the child, or if appropriate at least one special education provider of the child" (34 C.F.R. § 300.314[a]). The new regulation does not include the language of the former regulation's footnote authorizing a board of education to designate the teacher member of the CSE in certain circumstances. In its official interpretation of the new IDEA regulations, the U.S. Department of Education has indicated that "the special education teacher or provider of the child who is a member of the child's IEP team should be the person who is, or will be, responsible for implementing the IEP" (See Appendix A to Part 300—Notice of Interpretation, Question 26).

Appendix F

The record shows that one of petitioner's educational evaluators was designated to serve as the special education teacher member of the CSE. At the hearing, the evaluator testified that she was certified by the State Education Department to teach special education, reading, and common branch subjects (Transcript p. 59). She was therefore qualified wider state law to teach respondent's son. However, the educational evaluator was not the student's current special education teacher, nor was she expected to be his special education teacher for the 1999-2000 school year.

As interpreted by the U.S. Department of Education, the new regulation offered the Board of Education three options in selecting an individual to serve as the student's special education teacher on the CSE. It could have had the student's private school teacher serve as the special education teacher member of the CSE. In the alternative, the special education teacher on the CSE could have been a special education teacher who would have been likely to implement the student's IEP. The third option would have been for the student's speech/language therapist to serve as the special education teacher member of the CSE.

A board of education cannot reasonably be expected to designate a teacher who will necessarily be a student's special education teacher to serve on a CSE before the CSE has determined what special education services should be provided to the student Nevertheless, it can be expected to have sufficient information about the student to ascertain what program or programs might be appropriate for the student, and to designate a special education teacher who is not only licensed or certified to teach in such programs, but

is also teaching in one of those programs. When apprised of the nature of the student's disability, such a teacher could provide significant guidance to the CSE about the student's ability to successfully function in those programs with appropriate support services. Petitioner's evaluator testified that she had taught in private schools before becoming an employee of the Board of Education. However, she had no personal knowledge of the student, and only general knowledge of the program recommended by the CSE. Under the circumstances, I must find that the educational evaluator could not serve as the student's special education teacher on the CSE since she could not provide the kind of knowledge of the student or the recommended program that I must assume was intended by the IDEA '97 and its regulations.

A board of education bears the burden of demonstrating the appropriateness of the program recommended by its CSE (*Application of a Child with a Disability,* Appeal No. 93-9; *Application of a Child with a Handicapping Condition,* Appeal No. 92-7; *Application of a Handicapped Child,* 22 Ed Dept Rep 487 [1983]). I must find that the Board of Education has not met its burden of proof because of its failure to have a validly constituted CSE. As petitioner well knows, the recommendation of a CSE which did not include each of the required members is a nullity (*Application of a Child with a Handicapping Condition,* Appeal No. 91-41; *Application of a Child with a Handicapping Condition,* Appeal No. 90-16). Having determined that the Board of Education failed to demonstrate the appropriateness of its recommended program, it is not necessary that I address its other challenges to the hearing officer's findings regarding grouping and mainstreaming.

Appendix F

A board of education may be required to pay for educational services obtained for a student by his or her parent if the services offered by the board of education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parent's claim (*Burlington School Comm. v. Dept of Educ.*, 471 U.S. 359 [1985]). The failure of a parent to select a program known to be approved by the state in favor of an unapproved option is not itself a bar to reimbursement (*Florence County School Dist. Four v. Carter,* 510 U.S. 7 [1993]). I find that respondent has prevailed with respect to the first criterion for an award of tuition reimbursement because the Board of Education could not demonstrate the appropriateness of the CSE's recommendation.

A student's parent bears the burden of proof with regard to the appropriateness of the services selected (*Application of a Child with a Disability,* Appeal No. 95-57; *Application of a Child with a Disability,* Appeal No. 94-29; *Application of the Board of Educ.*, Appeal No. 93-34). In order to meet that burden, the parent must show that the private school offered an educational program which met the student's special education needs (*Application of a Child with a Disability,* Appeal No. 94-29). The private school need not employ certified special education teachers, nor have its own IEP for the student (*Application of a Child with a Disability,* Appeal No. 94-20).

The hearing officer found that there was more than sufficient evidence demonstrating that the program at Gaynor was suiting the student's needs and providing him with an appropriate education. He noted that the student made progress at Gaynor and that the progress could be traced to

Gaynor's thorough reading program. Although the Board of Education seeks to have the hearing officer's decision reversed in its entirety, it has not challenged the hearing officer's finding that the educational services which Gaynor provided to respondent's son were appropriate for the student. Absent a specific challenge to that finding, there is no reason for me to review it. Accordingly, I find that respondent has prevailed with respect to the second criterion for an award of tuition reimbursement.

The third criterion for an award of tuition reimbursement is whether the parent's claim is supported by equitable considerations. The Board of Education contends that respondent is barred from receiving an award of tuition reimbursement because his son has not received special education services from a public agency. It relies upon the provisions of 20 U.S.C. § 1412(a)(10)(C)(ii). Petitioner's argument has been considered and rejected in prior appeals (*Application of a Child with a Disability,* Appeal No. 00-008; *Application of a Child with a Disability,* Appeal No. 98-4). I reach the same conclusion in this appeal. I also note that there is no indication in the record that respondent failed to cooperate with the CSE. Accordingly, I find that equitable considerations support the parent's claim and that he is entitled to reimbursement for the cost of his son's tuition at Gaynor for the 1999-2000 school year.

THE APPEAL IS DISMISSED.

s/ Robert G. Bentley
ROBERT G. BENTLEY

Dated: Albany, New York
March 30, 2001

APPENDIX G — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN FRANK G., *et al.* v. BOARD OF EDUCATION OF HYDE PARK CENTRAL SCHOOL DISTRICT, DECIDED JULY 27, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2004

(Argued: August 3, 2005 Decided: July 27, 2006)

Docket No. 04-4981-cv

FRANK G. and DIANNE G., Parents of a Disabled Student, ANTHONY G.,

Plaintiffs-Appellees,

v.

BOARD OF EDUCATION OF HYDE PARK CENTRAL SCHOOL DISTRICT,

Defendant-Appellant.

Before POOLER, SOTOMAYOR, Circuit Judges, and KORMAN, District Judge.*

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* The Honorable Edward R. Korman, Chief Judge of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix G

KORMAN, District Judge.

This appeal arises out of the efforts of the parents of a learning disabled child to obtain reimbursement for the private school tuition they incurred as a result of the failure of a local educational agency to provide him with a free appropriate public education. Specifically, defendant-appellant Board of Education of Hyde Park Central School District ("School District") appeals from a judgment of the United States District Court for the Southern District of New York (Brieant, J.) finding that the School District had failed to provide the learning disabled child of plaintiff-appellees Frank and Dianne G. a free appropriate public education as defined under the Individuals with Disabilities Act ("IDEA"), 20 U.S.C. § 1400 et se. The School District argues that the district court erred in awarding plaintiff's reimbursement for tuition and attorneys' fees because, under the IDEA, Anthony's enrollment in private school was not appropriate and because the IDEA, 20 U.S.C. § 1412(a)(10)(C), permits reimbursement only where a child has previously received special education and related services. For the reasons stated below, we disagree with the School District's arguments and affirm the decision of the district court.

FACTUAL BACKGROUND

Frank and Diane G. are the adoptive parents of Anthony, who was born to a crack-addicted mother on May 21, 1991. Since the age of three, Anthony has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). During the 1997-98 school year, Anthony attended kindergarten at the Randolph School, a private school in Wappingers Falls,

New York. From 1997 to 2001, Anthony completed first through fourth grade at Bishop Dunn School, a private school in Newburgh, New York. While Anthony did well at Bishop Dunn initially, as he progressed from first through fourth grade, his performance worsened in relation to the increasingly challenging academic environment and bigger class sizes he faced. In April 2000, in response to notification from Anthony's parents, the Committee on Special Education ("CSE") of the School District classified Anthony as learning disabled under the IDEA, Article 89 of the New York Education Law, and Part 200 of Title 8 of the Regulations of the Commissioner of Education.

During the spring of 2001, Anthony was evaluated by School District personnel. An occupational therapy evaluation conducted on February 1, 2001, revealed deficits in visual memory and visual sequential memory skills. The evaluator recommended that Anthony receive group occupational therapy twice a week. A Key Math Assessment administered on March 9, 2001, revealed severe deficiencies in subtraction and problem solving, and below average skills in rational numbers and in areas involving multi-step applications. During an in-class behavioral assessment, Anthony was observed engaging in a significant amount of off-task behavior.

An independent neuropsychological evaluation was conducted during the spring and early summer of 2001 by Dr. Miriam Lacher. She administered a standardized individual achievement test to Anthony, during which she observed him engaging in negative self-evaluations and experiencing difficulty formulating responses, shifting tasks,

absorbing directions, and taking into account the important aspects of situations. Among her detailed recommendations, Dr. Lacher recommended that Anthony receive "individualized attention and a relatively small class," concluding that "[s]ince his current class size appears too large, consider dropping [him] down to a class of 12, with an aide to assist." Dr. Lacher also noted that Anthony's social skills would be most effectively addressed in a group setting, that his teacher should "[k]eep directions brief and simple," that he would "do best in 'old fashioned' home and school settings that stress values around control and provide routine, structure, discipline, and consistency as well as warmth." She also recommended, *inter* alia, that Anthony receive occupational therapy, social skills training in a group setting, and continued counseling.

On August 8, 2001, the CSE reviewed Anthony's performance from the previous year and developed an independent education plan ("IEP") for the 2001-02 school year. The CSE recommended placement in a regular education class of 26 to 30 students at the Ralph R. Smith Elementary School ("Smith School"), a public school within the School District, as well as direct consultant teacher services for math and organizational skills, a full-time individual aide, and related services of counseling, group occupational therapy, a behavior modification program, and testing modifications. The CSE also observed that Anthony was dually enrolled at Bishop Dunn for the 2001-2002 school year.

On August 10, 2001, Diane G. wrote to the School District and requested an impartial hearing to reconsider the

Appendix G

CSE's recommendation that Anthony receive special education services at the Smith School and asked that the CSE instead provide these services at Bishop Dunn. She emphasized that the Smith School's class size of 25 students or more would not be appropriate for Anthony, a position consistent with recommendations provided by Anthony's teachers and therapists. This letter had the effect of initiating a hearing before an Impartial Hearing Office ("IHO"), which took place over the course of four days between November 1 and December 13, 2001. In the meantime, Anthony's parents enrolled him at the Upton Lake Christian School ("Upton Lake"), a parochial school in Clinton Corners, New York, instead of Bishop Dunn. At Upton Lake, Anthony repeated fourth grade in a regular education class of 14 students.

The School District's initial position before the IHO was that Anthony's placement at the Smith School was appropriate and that the unilateral placement at Upton Lake was not appropriate. After one of its own witnesses testified that the class size and program it offered to Anthony was not appropriate, the School District conceded that the placement offered to Anthony at the Smith School was not appropriate. This left the School District with the defense that the Upton Lake placement was equally inappropriate and that it was not required to bear the expense of educating him there.

On February 22, 2002, the IHO accepted the concession of the School District that it "has failed to offer A[nthony] a free and appropriate public education." The IHO also agreed with Anthony's parents that he "needs a small structured classroom setting with an aid to assist him." Nevertheless,

the IHO agreed with the School District that Upton Lake was not an appropriate placement for Anthony and concluded that the School District was not required to reimburse plaintiffs for his tuition. Specifically, the IHO found that the placement of Anthony at Upton Lake was inappropriate because he was not making academic or social progress there. This conclusion was based on the fact that Anthony was inattentive in class, he received "needs improvement" in English, bible, history, and science; "needs improvement" in behavior; and unsatisfactory grades in reading and math on his Five Week Progress Report. In addition, Anthony's first grading period report card demonstrated that Anthony needed improvement in math, language arts, penmanship, spiritual growth, social growth, and independent work, and that he received unsatisfactory grades in reading worksheet activities, applying spelling skills to writing, and work and study habits. Nevertheless, the IHO ordered the School District to provide consultant teacher services, counseling, occupational therapy, and a one-to-one aide to Anthony at Upton Lake. The IHO's decision was based on evidence received through December 13, 2001.

Both parties filed an administrative appeal of the IHO's ruling to the State Review Officer ("SRO"). On the appeal, the School District "conceded that the regular education class placement recommended by its CSE did not appropriately address the student's needs" and it did "not challenge . . . the hearing officer's finding that it failed to offer" Anthony a free appropriate public education. On March 20, 2003, the SRO affirmed both the IHO's order denying tuition reimbursement and the order requiring the School District to provide Anthony a direct consultant teacher and a one-to-

one aide at Upton Lake. In concluding that Upton Lake was inappropriate, the SRO emphasized that Anthony's academic performance during the first and second quarters of 2001-2002 continued to be poor and that, while Upton Lake "appeared to address some of [Anthony's] organizational and social needs, it did not adequately address his deficits in math, written expression, and handwriting." Moreover, he also observed that Upton Lake provided Anthony "with accommodations, not specialized instruction in his main areas of need." The SRO did not consider evidence of Anthony's performance at Upton Lake during the third and fourth quarters of the 2001-02 academic year.

On July 18, 2003, plaintiffs filed a complaint in the Southern District of New York seeking tuition reimbursement for the 2001-02 school year. After a bench trial, Judge Brieant held that, in light of the additional evidence adduced at trial, Upton Lake was an appropriate placement for Anthony. Although mindful that a district court should defer to an SRO's educational experience, Judge Brieant emphasized that his decision was "not based solely on the evidence before the SRO," but was informed by additional evidence of Anthony's progress, including testimony of Anthony's social and behavioral development, his Stanford Achievement Test results, and his year-end grades. Anthony's teacher testified that during the second half of the year at Upton Lake, Anthony had "continued to make steady progress. He gained in emotional stability. He gained in the ability to work independently. He improved his grades tremendously." Moreover, the record before the SRO did not contain evidence of Anthony's "phenomenal" results from the Stanford Achievement Test, including evidence that Anthony

completed the test without any special accommodations, and that he had scored below average in only two subcategories under math procedure and one subcategory under reading comprehension, while scoring average or above average in every other category and subcategory, including reading vocabulary, reading comprehension, mathematics problem-solving, mathematics procedure, language, spelling, study skills, science, social science, listening, using information and thinking skills. Finally, the SRO did not have the benefit of Anthony's grades from the final two marking periods. As noted by Judge Brieant (and reflected in Anthony's final report card), Anthony's grades "increased in every subject with the exception of spelling from the first to the fourth marking period. Most notably, his grade in math increased from a 63 to a 91 and his reading grade increased from a 67 to a 91."

While Judge Brieant acknowledged that Upton Lake had neither provided Anthony with an individual aide nor with direct consultant teacher services, he was satisfied that Anthony's teacher, Ms. Linda Fredericks, had worked with Anthony individually when possible, and that "she also made certain testing and other academic modifications for Anthony to assist him in successfully completing his assignments." He also noted that, as Anthony progressed over the course of the year, the need for individual attention lessened. Concluding that the facts from the administrative record and the trial demonstrated that "Anthony made meaningful academic and social progress and received educational benefit," Judge Brieant awarded tuition reimbursement to plaintiff-appellees in the amount of $3,660.00. He noted that, while the SRO had not addressed whether equitable

considerations would prohibit an award of tuition reimbursement, there was no evidence on the record to disturb the IHO's finding "that the equities favored tuition reimbursement" if on appeal it is found that the parent's placement is appropriate. Judge Brieant also awarded attorneys' fees in the amount of $34,567.00, or $10,903.13 less than the total amount requested by the parents, while expressing concern over the total expenses of the litigation in light of the relatively small tuition sum sought and awarded.

The School District appeals from the judgment entered by Judge Brieant. It argues that the private school education for which reimbursement was sought was not an appropriate placement, that the district court failed to accord appropriate deference to the administrative findings, that equitable circumstances do not warrant an award and that the district court abused its discretion both in considering additional evidence and in determining the attorney fee award. The School District also argues that the 1997 amendments to the IDEA, 20 U.S.C. § 1400 et *seq.*, established a threshold requirement that a disabled child must have previously received public special education and related services in order to be eligible for reimbursement and that plaintiffs have failed to satisfy that requirement.

DISCUSSION

Congress enacted the IDEA to promote the education of children with disabilities, "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related

services designed to meet their unique needs [and] . . . to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1); *see Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 367, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). A free appropriate public education "must include 'special education and related services' tailored to meet the unique needs of a particular child, and be 'reasonably calculated to enable the child to receive educational benefits.' " *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir.1998) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)) (internal citation omitted).

The key element of the IDEA is the development of an IEP for each handicapped child, which includes "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." *Burlington*, 471 U.S. at 368, 105 S.Ct. 1996. The IEP is collaboratively developed by the parents of the child, educators, and other specialists. 20 U.S.C. § 1414(d)(1)(B); *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). New York has set forth regulations to implement the goals of the IDEA, which "appear to track the IDEA closely." *Bd. of Educ. v. O'Shea*, 353 F.Supp.2d 449, 454 (S.D.N.Y.2005); *see* N.Y. Comp.Codes R. & Regs. tit. 8, § 200.1 *et seq.* "In developing a particular child's IEP, a [Committee on Special Education] is required to consider four factors: (1) academic achievement and learning characteristics, (2) social development, (3) physical development, and (4) managerial or behavioral needs." *Walczak*, 142 F.3d at 123 (citing N.Y. Comp.Codes R. & Regs. tit. 8 § 200. 1(kk)(2)(i) (1997)).

Appendix G

If a state fails in its obligation to provide a free appropriate public education to a handicapped child, the parents may enroll the child in a private school and seek retroactive reimbursement for the cost of the private school from the state. *Burlington*, 471 U.S. at 370, 105 S.Ct. 1996; *M.S. ex rel. S.S. v. Bd. of Educ.*, 231 F.3d 96, 102 (2d Cir.2000). In determining whether parents are entitled to reimbursement, the Supreme Court has established a two pronged test: (1) was the IEP proposed by the school district inappropriate; (2) was the private placement appropriate to the child's needs. *See Burlington*, 471 U.S. at 370, 105 S.Ct. 1996; *see also Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 12-13, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993). Moreover, because the authority to grant reimbursement is discretionary, "equitable considerations [relating to the reasonableness of the action taken by the parents] are relevant in fashioning relief." *Burlington*, 471 U.S. at 374, 105 S.Ct. 1996; *M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 68 (2d Cir.2000); 20 U.S.C. § 1412(a)(10)(C)(iii)(III).

Parents seeking reimbursement for a private placement bear the burden of demonstrating that the private placement is appropriate, even if the proposal in the IEP is inappropriate. *M.S.*, 231 F.3d at 104. Nevertheless, parents are not barred from reimbursement where a private school they choose does not meet the IDEA definition of a free appropriate public education. *See* 20 U.S.C. § 1401(9). An appropriate private placement need not meet state education standards or requirements. *Carter*, 510 U.S. at 14, 114 S.Ct. 361. For example, a private placement need not provide certified special education teachers or an IEP for the disabled student.

Id. In addition, parents "may not be subject to the same mainstreaming requirements as a school board." *M.S.*, 231 F.3d at 105 (citing *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 84 (3d Cir.1999) (holding that "the test for the parents' private placement is that it is appropriate, and not that it is perfect")).

Subject to the foregoing exceptions, the same considerations and criteria that apply in determining whether the School District's placement is appropriate should be considered in determining the appropriateness of the parents' placement. Ultimately, the issue turns on whether a placement-public or private-is "reasonably calculated to enable the child to receive educational benefits." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); *Muller ex rel. Muller v. Comm. on Special Educ.*, 145 F.3d 95, 105 (2d Cir.1998). While the IDEA does not require states to "maximize the potential of handicapped children," *Rowley*, 458 U.S. at 213, 102 S.Ct. 3034, it must provide such children with "meaningful access" to education, *Walczak*, 142 F.3d at 133. With these goals in mind, we have held that for an IEP to be reasonably calculated to enable a child to receive an educational benefit, it must be "likely to produce progress, not regression." *Id.* at 130 (quoting *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir.1997)). Courts must, therefore, "examine the record for any 'objective evidence' indicating whether the child was likely to make progress or regress under the proposed plan." *Id.* (quoting *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1121 (2d Cir.1997)). Thus, "in the regular classrooms of a public school system, the achievement of passing marks and regular advancement from grade to grade

will be one important factor in determining educational benefit." *Rowley*, 458 U.S. at 207 n. 28, 102 S.Ct. 3034; *see also Sherman v. Mamaroneck Union Free Sch. Dist.*, 340 F.3d 87, 93 (2d Cir.2003) (noting that "[p]assing grades are . . . often indicative of educational benefit"). Although it is more difficult to assess the significance of grades and regular advancement outside the context of regular public classrooms, these factors can still be helpful in determining the appropriateness of an alternative educational placement. *See Walczak*, 142 F.3d at 130.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207, 102 S.Ct. 3034. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. *See Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755 (6th Cir.2001) (holding that a unilateral private placement was appropriate where, *inter alia*, class sizes were small, the student made significant educational progress, and his grades and behavior improved significantly). To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. *See M. S.*, 231 F.3d at 105 ("The test for parents' private placement is not perfection.") (internal quotation marks omitted). They need only demonstrate that the placement provides "educational instruction specially designed to meet the unique needs of a

handicapped child, supported by such services as are necessary to permit the child to benefit from instruction." *Rowley*, 458 U.S. at 188-89, 102 S.Ct. 3034 (internal quotation marks omitted).

With this as a backdrop, we turn to two of the principal arguments of the School District, namely, that the enrollment of Anthony at Upton Lake was not appropriate to his needs and that, because Anthony had not previously received special education and related services, his parents are not entitled to reimbursement even if Upton Lake provided him with an appropriate special education. The School District describes the latter argument as its "absolute defense."

1. The Appropriateness of the Upton Lake Placement

The School District argues that, because Anthony "did not receive specialized instruction in any of his primary areas of need-written expression, handwriting, and math," Upton Lake was not an appropriate placement for him. The School District relies on *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 523 (6th Cir.2003), which held that a private placement was not appropriate because it had not provided the student with any of the special education services needed, even though the placement included smaller classes and the student had received better grades. The principle for which *Medina* is cited, however, is not as broad as the School District suggests. *Medina* held specifically that "a unilateral private placement cannot be regarded as 'proper under the [IDEA]' when it does not, at a minimum, provide some element of special education services in which the public school placement was deficient." *Id.* In this case, the concession of

the School District that its IEP was inappropriate came after the testimony of one of its witnesses, a teacher at the Smith School, that "a regular fifth grade class might not be best suitable" for Anthony, even with "direct consultant teacher services" and "a one-to-one aide." Instead, she recommended a combined, self-contained 22 fourth and fifth grade class in a classroom of nine students, as opposed to a regular classroom of 26-30 students, because she believed "a small class . . . would be the better place for him." Moreover, the IHO also agreed that the placement of Anthony at the Smith School was deficient because of its class size, and the SRO accepted the concession of the School District that its placement was inappropriate. The small class size offered at Upton Lake was one element of the special education services necessary to address a significant deficiency in the inappropriate public school placement the School District offered Anthony, and it comes within the IDEA definition of "special education," namely, "specially designed instruction . . . to meet the unique needs of a child." 20 U.S.C. § 1401(29).

We need not decide that small class size alone rendered the Upton Lake placement appropriate because Anthony's teacher at Upton Lake, Ms. Fredericks, adapted her instruction to meet his needs. Ms. Fredericks worked with Anthony one-on-one, created a communications book, gave Anthony extra time to complete work, and allowed him to work in isolated areas of the classroom. Ms. Fredericks also adapted the methodology of instruction by allowing Anthony to take tests orally. The transcript of the hearing before the IHO includes testimony that Anthony received assistance from a volunteer teacher's assistant, who, while working with

other students, spent time with Anthony, and "assist[ed] A[nthony] greatly throughout the day."

Moreover, Anthony's social and academic progress, and his score on the Stanford Achievement Test, support the appropriateness of the placement. These factors, as discussed above, indicate that the placement was reasonably calculated to enable him to receive educational benefits, especially when coupled with the adaptations made by Anthony's teacher. While the SRO, reasoning without the benefit of Anthony's final grades, had emphasized that Anthony had failed math for the first and second quarter of 2001-2002, and that Upton Lake did not address his deficits in math, Judge Brieant noted that Anthony's grade in math increased from a 63 to a 91 and his reading grade had increased from a 67 to 91.

The School District also challenges the finding of Anthony's "phenomenal" performance on the Stanford Achievement Test, noting that "no supplemental evidence offered at trial established any baseline from which to draw this comparison." This argument ignores the testimony at trial that Anthony was given a portion of the Stanford Achievement Test as a placement exam in August 2001, prior to his enrollment at Upton Lake, that he was unable to complete any problems in the math section, and that he completed only "a few" reading comprehension problems and that he was unable to write anything. Anthony's answers to this exam, and the test material itself, were entered as exhibits at trial. Contrary to the claim of the School District, this evidence provides a useful measure by which to compare Anthony's subsequent performance on the entire exam eight months later, whereupon he performed in the average or

above average range in every subject except for three subcategories in mathematic procedures and reading comprehension.

The School District relies on *Rafferty v. Cranston Pub. Sch. Comm.*, 315 F.3d 21, 26-27 (1st Cir.2002), for the proposition that "[e]ven if the child makes academic progress at the private school, 'that fact does not establish that such a placement comprises the requisite adequate and appropriate education.' " In *Rafferty*, parents of a child who had difficulty reading sought reimbursement for their child's unilateral placement in a reading clinic where she "spent four to five hours a day, five days a week alone with a clinician working on reading" but "did not study *any* other subjects, such as social studies, math, English, or science." *Id.* at 26 (emphasis added). Because of the absence of instruction in any subject but reading, *Rafferty* held that the child's demonstrated progress in reading, while not surprising, was insufficient to demonstrate that her placement was appropriate. *Id.* at 26-27. *Rafferty* is plainly distinguishable on its facts from the present case because Anthony studied a wide range of academic subjects at Upton Lake.

Nor is this a case in which Anthony's progress can be attributed reasonably to "mere happenstance." *Medina*, 348 F.3d at 522 n. 6. Anthony was provided with a small class size, which everyone agreed was critical, and his program was specially designed to accommodate his needs. The progress he made was more likely attributed to these factors than to "mere happenstance." Indeed, the IHO and SRO did not find Anthony's placement at Upton Lake inappropriate because the progress he made was "mere happenstance."

Instead, they relied in significant part on the fact that, as of December 13, 2002, Anthony was doing poorly at Upton Lake and evidence suggested a lack of progress.

If Judge Brieant had reached the opposite conclusion based on the same record, we would likely not affirm that decision because "[a]n assessment of educational progress is a type of judgment for which the district court should defer to the SRO's educational experience, particularly where . . . the district court's decision was based solely on the record that was before the SRO." *M. S.*, 231 F.3d at 105. Judge Brieant, however, was able to rely on evidence that was not available to the SRO to conclude that Anthony had made significant progress. This progress, viewed together with small class size and the program offered at Upton Lake, is sufficient to support Judge Brieant's judgement that Anthony received an education "reasonably calculated to enable the child to receive educational benefits." *Knable*, 238 F.3d at 770. In reaching this conclusion, Judge Brieant recognized the deference to which the judgement of the SRO is generally entitled and he correctly applied the rule that, when reviewing administrative decisions, federal courts "must base their decisions on 'the preponderance of the evidence,' taking into account the evidence in the administrative record *and* 'any further evidence presented before the District Court by the parties.'" *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 380 (2d. Cir.2003) (citing 20 U.S.C. § 1415(i)(2)(B)).

2. The School District's "Absolute Defense"

The School District argues that it has "an absolute legal defense" to Anthony's parents' claim for reimbursement, even

if Upton Lake provided him with an appropriate public education. This defense is based on one of the 1997 amendments to the IDEA, 20 U.S.C. § 1412(a)(10)(C)(ii), which the School District argues, "established a statutory threshold for parents to recover tuition reimbursement when enrolling their child in a private school without the consent of the school district." Specifically, it argues that it may deny reimbursement to the parents of disabled students who had enrolled them in regular public or private schools prior to the emergence of the need for a free appropriate public education to meet their unique needs. Only after a learning disabled student enrolled in an inappropriate special education program offered by a public agency would his parents be free unilaterally to enroll him at an appropriate private school and seek reimbursement. Because Anthony never received special education and related services from a public agency prior to his enrollment at Upton Lake, the School District argues, his parents are not entitled to reimbursement for his tuition there.

The justification offered for this argument is the assertedly plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) which authorizes reimbursement to the parents of a disabled child, "who previously received special education and related services under the authority of a public agency" and who enrolled the child in a private elementary or secondary school without the consent or referral of the private agency, "if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to enrollment." 20 U.S.C. § 1412(a)(10)(C)(ii). Because the authority granted by this subsection applies to the reimbursement of parents of

disabled children, "who previously received special education and related services under the authority of a public agency," the School District argues that it should be read as implicitly excluding reimbursement to parents who enrolled their child in a public or private school before the need for a free appropriate special education manifested itself. "The clear implication of the plain language, however, is that where a child has *not* previously received special education from a public agency, there is no authority to reimburse the tuition expense arising from a parent's unilateral placement of the child in private school." *Bd. of Educ. v. Tom F.*, 2005 WL 22866, at *3 (S.D.N.Y. Jan. 4, 2005). We disagree.

As in all statutory interpretation cases, we begin with the language of the statute. Our first task "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002). Our inquiry ends, if the language of the statute is unambiguous and "the statutory scheme is coherent and consistent," unless the case comes within the category of cases in which the result reached by applying the plain language is sufficiently absurd to override its unambiguous terms. *Id.* at 450, 459, 122 S.Ct. 941 (internal quotation marks and citation omitted); *United States v. X-Citement Video Inc.*, 513 U.S. 64, 69, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994); *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989). If, however, the terms of a statute are ambiguous, "we resort to the canons of statutory construction to help resolve the

ambiguity." *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 337 (2d Cir.2006). Moreover, while the Supreme Court has said that it "rarely" invokes the need to avoid an absurd result to override the plain language of a statute, *Barnhart*, 534 U.S. at 459, 122 S.Ct. 941, we have long held that where a statute is ambiguous, it "should be interpreted in a way that avoids absurd results." *See, e.g., United States v. Dauray*, 215 F.3d 257, 264 (2d Cir.2000).

Whether a statute is plain or ambiguous "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). We have applied a similar approach in determining whether a provision of a contract is ambiguous. Specifically, we have held that "[l]anguage is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." *O'Neil v. Retirement Plan for Salaried Employees of RKO, Inc.*, 37 F.3d 55, 59 (2d Cir.1994) (internal quotations omitted).

The plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) does not say that tuition reimbursement is *only* available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents whose child had not previously received special education and related services. Indeed, the School District's need to rely on an inference to be drawn from the plain language, rather than the language itself, suggests a degree of ambiguity

that would not necessarily be present if § 1412(a)(10)(C)(ii) was the only section of the IDEA that spoke to the issue of the remedy that a district court may award. This section, however, is not the only section or even the principal section of the IDEA that speaks to this issue.

Another section of the IDEA, 20 U.S.C. § 1415(i)(2)(C), authorizes a district court hearing a challenge to the failure of a local education agency to provide a free appropriate public education to "grant such relief as [it] determines is appropriate." In *Burlington*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385, the Supreme Court held that the identically worded predecessor of this section, 20 U.S.C. § 1415(e)(2) (1984), authorized the equitable remedy of tuition reimbursement to parents who had enrolled their disabled child in a private school while they successfully litigated the issue of the inappropriateness of his public placement. Then-Justice Rehnquist explained the reasoning of the decision as follows:

> The statute directs the court to "grant such relief as [it] determines is appropriate." The ordinary meaning of these words confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with "a free appropriate public education which emphasizes special education and related services designed to meet

> their unique needs." The Act contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as non-handicapped children, but the Act also provides for placement in private schools at public expense where this is not possible. *See* § 1412(5); 34 CFR §§ 300.132, 300.227, 300.307(b), 300.347 (1984). In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

Burlington, 471 U.S. at 369-70, 105 S.Ct. 1996.

Prospective relief alone is not a sufficient remedy because the process of obtaining the relief "is ponderous" and a "final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed." *Id.* at 370, 105 S.Ct. 1996. Under these circumstances, "it would be an empty victory to have a court tell [parents who placed their child in a private school] several years later that they were right," yet deny them reimbursement for the placement. *Id.* "If that were the case," Justice Rehnquist concluded, "the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because

Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement as an available remedy in a proper case." *Id.*

The language of § 1415(e)(2), upon which *Burlington* relied, was unchanged by the 1997 revision of the IDEA and continues to provide that the court "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). The re-enactment of § 1415(e)(2), without change, is significant because it can be presumed that Congress intended to adopt the construction given to it by the Supreme Court and made that construction part of the enactment. *Shapiro v. United States*, 335 U.S. 1, 16, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948); *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 500, 53 S.Ct. 721, 77 L.Ed. 1331 (1933). Whether 20 U.S.C. § 1412(a)(10)(C)(ii), upon which the School District relies, was intended to eliminate the power of a district court to grant the relief to which Anthony's parents would otherwise be entitled, involves a question to which the IDEA does not provide an unambiguous answer. Indeed, the assertedly "clear implication of the plain language" of § 1412(a)(10)(C)(ii), *Tom F.*, 2005 WL 22866, at *3, is inconsistent with the clear implication of § 1412(a)(10)(C)(i), which in relevant part provides that the obligation of a state to offer a free appropriate education "does not require a local educational agency to pay for the cost of education . . . of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." The implication of this subsection is that reimbursement is

available where, as here, the agency failed to make a free public education available to the child. *See Carmel Cent. Sch. Dist. v. V.P. ex rel. G.P.*, 373 F.Supp.2d 402, 414 (S.D.N.Y.2005) ("Subsection (i), read alone, suggests that the failure of a district to make a [free appropriate public education] available to a student in the first instance would entitle the parents to reimbursement even if the child had not previously received services.").

Under these circumstances, we think it is hardly clear from the fact that § 1412(a)(10)(C)(ii) provides for parental reimbursement in one circumstance, that it excludes reimbursement in other circumstances. Our conclusion is supported by the cases in which a party relies on the Latin maxim *"expressio unius est exclusio alterius,"* that the express statutory mention of certain things impliedly excludes others not mentioned. The School District may not invoke this maxim here, because it "applies only when the statute identifies a series of two or more terms or things that should be understood to go hand in hand, thus raising the inference that a similar unlisted term was deliberately excluded." *United States v. City of New York*, 359 F.3d 83, 98 (2d Cir.2004) (internal quotation marks and citation omitted). Nevertheless, even where the maxim is otherwise applicable, the Supreme Court has not treated as conclusive the inference that Congress intended to exclude that which it did not explicitly include. Instead, it has treated the maxim "as but an aid to construction." *Sec. & Exch. Comm'n v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351 n. 8, 64 S.Ct. 120, 88 L.Ed. 88 (1943). Indeed, only recently the Supreme Court held that "[w]e do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress

considered the unnamed possibility and meant to say no to it." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003).

Where, as here, the terms of a statute are ambiguous, we turn to the "traditional canons of statutory construction to resolve the ambiguity." *United States v. Peterson*, 394 F.3d 98, 105 (2d Cir.2005). "Although the canons of statutory interpretation provide a court with numerous avenues for supplementing and narrowing the possible meaning of ambiguous text," *Nat'l. Res. Def. Council v. Muszynski*, 268 F.3d 91, 98 (2d Cir.2001), several rules are particularly helpful in interpreting the statutory provision at issue in this case. Where the terms of a statute are ambiguous, we "focus upon the 'broader context' and 'primary purpose' of the statute." *Can. Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG*, 335 F.3d 52, 57 (2d Cir.2003) (quoting *Castellano v. City of New York*, 142 F.3d 58, 67 (2d Cir.1998)) (citations omitted); *see also Nat'l. Res. Def. Council*, 268 F.3d at 98 ("[W]hen determining which reasonable meaning should prevail, the text should be placed in the context of the entire statutory structure."). Ultimately, as Justice Jackson observed, "courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *Joiner*, 320 U.S. at 350-51, 64 S.Ct. 120; *see also Richards v. United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962); *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.1945), *aff'd*, 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165 (1945) ("[S]tatutes always have some purpose

or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.") (Hand, L., J.) (quoted with approval in *Pub. Citizen*, 491 U.S. at 455, 109 S.Ct. 2558).

A second and related rule of statutory construction is that the meaning of an ambiguous statutory provision is "clarified by the remainder of the statutory scheme . . . [when] only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217-18, 121 S.Ct. 1433, 149 L.Ed.2d 401 (2001) (quoting *United Sav. Ass'n. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988)). The rule is particularly applicable here, because the issue involves an ambiguity created by the tension between different sections of the IDEA rather than the interpretation of an ambiguous word or phrase.

Applying these rules in the present case, we again observe that the express purpose of the IDEA is to ensure that a free appropriate public education is "available to all children with disabilities." Indeed, the IDEA is the legislative centerpiece of "an ambitious federal effort to promote the education of handicapped children." *Voluntown*, 226 F.3d at 62 (quoting *Walczak*, 142 F.3d at 122). Its central purpose is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living" and "to ensure that the rights of children with disabilities and parents of such

children are protected." 20 U.S.C. § 1400(d)(1)(A)-(B). The IDEA also provides that a state's eligibility for IDEA funding is that it make available "free appropriate public education . . . to all children with disabilities." 20 U.S.C. § 1412(a)(1).

One of the primary ways in which the IDEA seeks to ensure that children with disabilities receive a free appropriate education is by conferring broad discretion on the district court to grant relief it deems appropriate to parents of disabled children who opt for a unilateral private placement in cases where the parents' placement is determined to be proper and the proposed IEP is determined to be inadequate. *See* 20 U.S.C. § 1415(i)(2)(C)(iii). While the manner in which the authority is exercised may be guided by the various subsections of § 1412(a)(10), which mainly codified existing law in significant respect, *Voluntown*, 226 F.3d at 69 n. 9, nothing in the legislative history (to be discussed shortly) suggests that Congress sought to alter prior law in a manner that would constrain the power of a district court judge to award reimbursement for a private placement where a free appropriate public education had not been provided under the circumstances here.

The Supreme Court has also instructed us that, because "[t]he [IDEA] was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." *Burlington*, 471 U.S. at 372, 105 S.Ct. 1996; *Carter*, 510 U.S. at 12-13, 114 S.Ct. 361; *see also Still v. DeBuono*, 101 F.3d 888, 893 (2d Cir.1996). The construction of the § 1412(a)(10)(C)(ii) that the School District urges upon us would defeat both purposes of the IDEA. The construction

we adopt is the only one that "produces a substantive effect that is compatible with the rest of the law." *Cleveland Indians Baseball Co.*, 532 U.S. at 217-18, 121 S.Ct. 1433 (quoting *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. at 371, 108 S.Ct. 626).

This brings us to the last rule of statutory construction applicable here. This rule, as we previously observed, is that ambiguous statutes are to be construed so as to avoid absurd results. The School District's interpretation of 20 U.S.C. § 1412(a)(10)(C)(ii) would produce such results. It would, for instance, prevent children who are provided with inadequate IEPs from receiving a free appropriate public education if their disabilities were detected before they reached school age. It would also place the parents of children with disabilities in the untenable position of acquiescing to an inappropriate placement in order to preserve their right to seek reimbursement from the public agency that devised the inappropriate placement. Such a result, it has been suggested, "ensures that a parent's rejection of a public school placement is not based on mere speculation as to whether the recommended school placement would have been appropriate." *Tom F.*, 2005 WL 22866, at *3. This suggestion turns on the erroneous assumption that parents would have to keep their child in a public school placement until it was clear that their "speculation" was borne out by a wasted year of actual failure. Such a "first bite" at failure is not required by the IDEA. All that is required of parents who have received an IEP for their child is that they provide the appropriate public agency with reasonable notice that they plan to "reject [ ] the placement proposed by the public agency to provide a free appropriate public education to their child, including

stating their concerns and their intent to enroll their child in a private school at public expense." 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa)-(bb). Because such notice was provided here, Anthony's parents would have been free to enroll him in a private school if they had enrolled him first in the Smith School as provided in the IEP and then removed him thereafter.

We believe that it is unreasonable to suggest that Anthony's parents were legally required to engage in such a useless and potentially counterproductive exercise, given Anthony's "need for constant and consistent care, even brief periods of inappropriate schooling could lead to tremendous educational, social, emotional, and psychological deterioration." *Connors v. Mills*, 34 F.Supp.2d 795, 804 (N.D.N.Y.1998). We decline to interpret 20 U.S.C. § 1412(a)(10)(C)(ii) to require parents to jeopardize their child's health and education in this manner in order to qualify for the right to seek tuition reimbursement.

Our interpretation is consistent with that of the Department of Education's Office of Special Education & Rehabilitative Services. Specifically, the agency wrote in response to an inquiry:

> In our view, it does not appear that this question presented by your query-namely, whether actual receipt of some form of special education and related services from a public agency is a prerequisite for a parent's ability to seek tuition reimbursement for all or part of the cost of their child's unilateral private school placement-is

> answered by § 612(a)(10)(C) [20 U.S.C. § 1412(a)(10)(C)] of IDEA 297. We do not view § 612(a)(10)(C) [20 U.S.C. § 1412(a)(10)(C)] as foreclosing categorically an award of reimbursement in a case in which a child has not yet been enrolled in special education and related services under the authority of a public agency. Reimbursement is an equitable remedy that courts and hearing officers may order in appropriate circumstances. In such a case, a parent may wish to avail him or herself of due process and judicial action, so that a hearing officer or court can determine whether there has been a denial of [a free appropriate public education], and, if so, whether and to what extent tuition reimbursement would be warranted.

Letter to Susan Luger, listed in 65 Fed.Reg. 9178 (Feb. 23, 2000) and reprinted in 33 I.D.E.L.R. 126 (March 19, 1999). While the interpretation comes in the form of an informal letter, deference to a policy letter may be appropriate where the statutory language is ambiguous. *Honig*, 484 U.S. at 325 n. 8, 108 S.Ct. 592. We have suggested that the degree of deference remains unclear. *See St. Johnsbury Acad. v. D.H.*, 240 F.3d 163, 171 (2d Cir.2001). Nevertheless, we need not resolve this issue here because we do not so much defer to the OSEP letter as we take comfort from the fact that it is consistent with our own construction of an ambiguous statute.

Contrary to the School District's argument, the legislative history does not alter our conclusion. The issue is addressed in the Report of the House Committee on Education and the

Workforce. The Report begins by explaining that "[t]he bill makes a number of changes to clarify the responsibility of public school districts to children with disabilities." H.R. No. 105-95, at 92 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 90. One of the changes to the IDEA is the addition of 20 U.S.C. § 1412, the purpose of which is explained as follows:

> Section 612 [20 U.S.C. § 1412] also specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). Previously, the child must have had received special education and related services under the authority of a public agency.

H.R.Rep. No. 105-95, at 92 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 90.

At best, this language is an awkward paraphrase of the ambiguous statutory language which refers to "the parents of a child with a disability, who previously received special education and related services under the authority of a public agency." Again, the statutory language does not expressly exclude reimbursement where special education and related services have not been previously provided, it only provides a basis for the argument that Congress implicitly excluded

reimbursement in these circumstances. The district judge in *Tom* F., however, read the language in the House Report to require explicitly that the child "must" have "[p]reviously . . . received" such services as a condition to the receipt of reimbursement of his parents. 2005 WL 22866, at *3. We cannot agree.

A natural reading of the word "previously," in the context of a report detailing changes to the IDEA, would suggest a reference to the IDEA's previous requirements. Thus, the first sentence of the paragraph unequivocally provides reimbursement for a private placement "when a due process hearing officer or judge determines that a public agency has not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent." The second sentence explains that "*[p]reviously*, the child must have received special education and related services under the authority of a public agency." (emphasis added). To paraphrase the words of the Supreme Court in an analogous context, *Lindh v. Murphy*, 521 U.S. 320, 330, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), "[a] thoughtful Member of the Congress" reading this explanation for a change in prior law would have very likely concluded (1) that "previously," meaning prior to the proposed amendment to the IDEA, parents could receive reimbursement for a private placement only if the child received special education and related services under the authority of a public agency and (2) that the change afforded by the proposed amendment would permit funding even where the disabled child had not previously received such special education and related services. This is just the opposite of what the School District and *Tom F.* argue is the clearly expressed intent of Congress.

Appendix G

The House Report gives no indication that Congress intended to amend the IDEA's rules regarding tuition reimbursement. Indeed, the House Report makes no reference to prior law on the issue and expresses no intent to limit the discretion that *Burlington* vested in district courts to award reimbursement pursuant to 20 U.S.C. § 1415(i)(2)(B). Nor does it explain the reason why it attached the condition at issue here to private placement reimbursement. Indeed, the House Report is as significant for what it does not say as for what it does say.

Justice Scalia has marshaled persuasively the dangers of relying on congressional committee reports in interpreting statutes. Antonin Scalia, *A Matter of Interpretation* 19-36 (Princeton University Press, 1998). We have not accepted Justice Scalia's argument that such reports should never be resorted to in construing a statute. *See, e.g., Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 336-37 (2d Cir.2005). Nevertheless, the House Report in this case is of a kind that calls to mind the admonition that "[r]eliance on legislative history in divining the intent of Congress is, as has often been observed, a step to be taken cautiously." *Piper v. Chris-Craft Indus. Inc.*, 430 U.S. 1, 26, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977). We decline to take that step here and to pay any deference to the confusing explanation of the purpose of § 1412(a)(10)(c)(ii). Cf. *Gottlieb*, 436 F.3d at 337-38, (holding that resort to legislative history is appropriate only if the plain language of the statute and the canons of statutory interpretation fail to resolve an ambiguity).

Appendix G

This brings us to the last leg of the School District's argument-its reliance on *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150 (1st Cir.2004). *Greenland* held only that parents of a learning disabled child, who unilaterally placed their child in a private school without notice to the local educational agency of their child's need for special education and without offering the agency an opportunity to prepare an IEP that is appropriate to the child's needs, were not eligible for tuition reimbursement. *Id.* at 159-60. Indeed, rather than simply denying the parent's claim for reimbursement on the ground that their child had not previously received special education and related services from a public agency, *Greenland* canvassed the entire statutory scheme, including § 1412(a)(10)(c)(ii), and concluded that "[t]hese statutory provisions make clear Congress's intent that *before* parents place their child in private school, they must at least give notice to the school that special education is at issue. This serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided in the public schools." *Id.* at 160 (emphasis in original) (citations omitted). We do not regard *Greenland* as dispositive.

Greenland's discussion of 20 U.S.C. § 1412(a)(10)(C)(ii) arose from its perceived need to deal with the subsection immediately preceding it. Again, this subsection, § 1412(a)(10)(C)(i), says that a local education agency is not required to pay for the cost of education, including special education and related services, "if that agency made a free public education available to the child and the parents elected to place the child in such private school or facility." This language troubled the *Greenland* Court, because it implied that parents are entitled to

reimbursement if a free appropriate public education was not provided "where, as here [in *Greenland]*, the local education agency was never informed while the child was in public school that the child might require special education services." 358 F.3d at 159. This "seeming ambiguity," according to *Greenland*, "disappears when considered in light of the section's affirmative requirement that 'the parents of a child with a disability, who previously received special education and related services under the authority of a public agency' can receive reimbursement for their unilateral placement of the child in private school only 'if [a] court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.' " *Id.* (quoting 20 U.S.C. § 1412(a)(10)(C)(ii)). *Greenland* continued as follows:

> These threshold requirements are key to this case: tuition reimbursement is *only* available for children who have previously received "special education and related services" while in the public school system *(or perhaps those who at least timely requested such services while the child is in public school).* There is no dispute that neither Katie's parents nor anyone else requested an evaluation for Katie while she was at Greenland. There is also no dispute that she was removed from Greenland for reasons having nothing to do with any issue about whether Katie was receiving [a free appropriate public education].

Id. at 159-60 (emphasis added). The *Greenland* Court then went on to deny the parents' claim for reimbursement because

of their failure to alert the School District of Katie's need for special education and related services while she was in public school. We agree completely with the result reached in *Greenland.* Indeed, we reached the same result in *Voluntown*, 226 F.3d at 68-69, without reference to § 1412(a)(10)(C)(ii).

Our problem with the analysis in *Greenland* is that it assumes that the ambiguous language of § 1412(a)(10)(C)(ii) is clear by adding the word "only" to the language of the subsection. Indeed, not a single word of the language we have emphasized in the foregoing quote appears in the language of the subsection. This includes the suggestion that a child in public school need not have previously received "special education and related services;" the child need only have made a request for it while in a public school. Simply stated, without discussion or analysis, *Greenland* resolved the issue of the ambiguity of § 1412(a)(10)(C)(ii) by simply amending the language itself. Moreover, it did so in a way, perhaps inadvertently, that implicitly suggested an arbitrary distinction between children enrolled in a regular public school and children enrolled in a regular private school. Perhaps even more troubling is that none of this discussion was necessary, because the subdivision immediately following § 1412(a)(10)(C)(ii) makes "clear Congress's intent that *before* parents place their child in private school, they must at least give notice to the school that special education is at issue." *Greenland*, 358 F.3d at 160 (emphasis in original) (relying on 20 U.S.C. § 1412(a)(10)(C)(iii)). Indeed, the latter subsection expressly states that "[t]he cost of reimbursement described in clause (ii) may be reduced or denied," if the prescribed notice is not given, 20 U.S.C.

§ 1412(a)(10)(C)(iii)(I), or "upon a judicial finding of unreasonableness with respect to actions taken by the parents," 20 U.S.C. § 1412(a)(10)(C)(iii)(III).

Separate and apart from subsection 1412(a)(10)(C)(ii), we have held that it is inequitable to permit reimbursement under the circumstances in *Greenland.* As we have observed: "[C]ourts have held uniformly that reimbursement is barred where parents unilaterally arrange for private educational services without ever notifying the school board of their dissatisfaction with their child's IEP." *M.C.*, 226 F.3d at 68. Indeed, in *Carmel*, 373 F.Supp.2d at 417, where the district judge followed the analysis of *Greenland* as it related to § 1412(a)(10)(C)(ii), she also denied reimbursement on the alternative ground that "the parents are not equitably entitled to tuition reimbursement." *Id.* at 407.

Unlike the parents of the child in *Greenland*, who provided "no notice at all to the school system before Katie's removal from Greenland that there was any issue about whether Katie was in need of special education," 358 F.3d at 160, in the instant case, Anthony's parents provided the School District with ample notice that he was in need of special education and the School District evaluated his needs in 2000, when he was classified as learning disabled, and again in 2001 at the request of his parents. When the School District provided Anthony with an IEP that Anthony's parents believed was inappropriate, Anthony's parents gave timely notice of their dissatisfaction to the School District. Before his enrollment in Upton Lake, the School District had every opportunity to evaluate Anthony in the regular private school that he was attending and determine whether "a free

appropriate public education can be provided in the public schools." *Id.* After forcing a hearing before an IHO, it conceded that it had failed to provide the free appropriate public education required by the IDEA. Section 1415(i)(2)(B), as construed by the Supreme Court in *Burlington*, provides an ample basis for the award of reimbursement to Anthony's parents. Section 1412(a)(10)(C)(ii) does not prohibit it.

We have considered carefully the other arguments raised by the School District and conclude that they are without merit. Accordingly, the judgment of the district court is affirmed.

Supreme Court, U.S.
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No. 06-637

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F. on behalf of GILBERT F., a minor child,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does the holding of the United States Court of Appeals for the Second Circuit, stating that the Individuals with Disabilities Education Act permits tuition reimbursement where a child has not previously received special education from a public agency, stand in direct contradiction to the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) which authorizes tuition reimbursement to the parents of a disabled child "who previously received special education and related services under the authority of a public agency"?

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The Summary Order of the United States Court of Appeals for the Second Circuit in the matter of *Board of Education of the City School District of the City of New York v. Tom F. on behalf of Gilbert F.* is reported at 193 Fed. Appx. 26 (2d Cir. 2006). Pet. App. A14.[2]

The Memorandum Decision of the United States District Court for the Southern District of New York in the matter of *Board of Education of the City School District of the City of New York v. Tom F. on behalf of Gilbert F.* is reported at 2005 U.S. Dist. LEXIS 49 (S.D.N.Y. 2005). Pet. App. A1.

JURISDICTION

The United States Court of Appeals for the Second Circuit vacated the Judgment of the United States District Court for the Southern District of New York on August 9, 2006. Pet. App. A15. The Petition for a Writ of Certiorari was filed on November 6, 2006 and was granted on February 26, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

At issue in this case is the interpretation and application of 20 U.S.C. § 1412(a)(10)(C)(ii). The relevant implementing regulation is 34 C.F.R. § 300.403(C).

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[1] The Joint Appendix, filed with this brief, is referred to as "App." followed by the page number.

[2] The Appendix to Petition for Writ of Certiorari, filed on November 3, 2006, is referred to as "Pet. App." followed by the page number.

STATEMENT OF THE CASE

I. Statutory Background.

This case presents the question of whether the Individuals with Disabilities Education Act ("IDEA") permits tuition reimbursement where a child has been unilaterally placed in private school by the parent and the child has not previously received special education or related services from a public agency.

The IDEA is a funding statute enacted pursuant to Congress's spending power.[3] *Arlington Central School District Board of Education v. Murphy*, __ U.S. __, 126 S.Ct. 2455, 2458 (2006). The IDEA ensures that all children with disabilities are given access to a free and appropriate public education ("FAPE"). 20 U.S.C. §§ 1400 *et seq.*

The IDEA authorizes federal financial assistance to States and to local school systems to ensure that the nation's disabled students have access to the public schools, and requires school systems to make FAPE available to all children with disabilities in their jurisdiction. 20 U.S.C. § 1412(a)(1). One of the congressional intents is to encourage mainstreaming of students wherever practicable. In exchange for federal financial assistance under the IDEA, Congress requires that States meet specified requirements in order to ensure compliance with the purpose of the statute.

[3] The IDEA was amended by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), which went into effect on July 1, 2005. As the events pertaining to this case took place prior to the effective date of the IDEIA, all statutory citations refer to the IDEA, as codified prior to the enactment of the IDEIA.

Compliance with the statute is assured by provisions that permit the withholding of federal funds upon a determination that a participating state or local agency has failed to satisfy the requirements of the IDEA. 20 U.S.C. §§ 1414(b)(2)(A), 1416.

FAPE is defined to include special education and related services that "(a) are provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the [state education agency], including the requirements of this part; (c) include preschool, elementary school, or secondary school education in the State; and (d) are provided in conformity with an individualized education program ("IEP") that meets the requirements of §§ 300.340 – 300.350."[4]

The Court has noted that special education means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. § 1401(16)." The Court further noted that related services are defined as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education. § 1401(17)." *Board of Education of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 188 (1982).

The Court has described an IEP as "a comprehensive statement of the educational needs of a handicapped child

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[4] 20 U.S.C. § 1412(a)(1); 34 C.F.R. § 300.121(a); 34 C.F.R. § 300.13. *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 367 (1985).

and the specially designed instruction and related services to be employed to meet those needs (citation omitted)" and has noted that an IEP "is to be developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and, where appropriate, the child." *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 367-68 (1985).

Under the IEP process, State educational authorities must identify and evaluate disabled children, §§ 1414(a)-(c), develop an IEP for each disabled child, § 1414(d)(2), and review every IEP at least once a year, § 1414(d)(4). Every IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services to be provided by the school. § 1414(d)(1)(A). In New York State, the IEP is produced by a Committee on Special Education, whose members are appointed by the board of education or trustees of the school district. *See* N.Y. Educ. Law § 4402(1) (McKinney Supp. 2005).

If a state that receives IDEA funding fails to provide a child with FAPE, the parent may remove the child to an appropriate private school, and may seek retroactive tuition reimbursement. *Burlington Sch. Comm. v. Dep't of Educ.*, *supra*, 471 U.S. at 369-70 (noting that parents who unilaterally change their child's placement while administrative review proceedings are pending do so at their own financial risk). A court or hearing officer may award tuition reimbursement if it finds: (1) that the proposed IEP was inadequate to afford the child an appropriate public education, and (2) the private education services obtained by the parents were appropriate to the child's needs; and

(3) the child previously received special education services from a public agency.[5] *M.S. v. Board of Education of the City School District of Yonkers*, 231 F.3d 96, 102 (2d Cir. 2000).

To meet its goals, the IDEA requires that states receiving federal funds offer parents of a disabled student an array of procedural safeguards designed to help ensure the education of the child. Under the IDEA, a parent may present complaints regarding any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child. 20 U.S.C. § 1415(b)(6). Under the applicable provisions of New York State law, the parents involved in such a complaint have an opportunity for an impartial due process hearing, conducted by a hearing officer appointed by the local board of education. 20 U.S.C. § 1415(f)(1), N.Y. Educ. Law § 4404(1) (McKinney Supp. 2005).

Except under limited circumstances, the IDEA does not require local school districts to pay for tuition at a private school. A local school district is not required to pay for the cost of education of a child with a disability at a private school or facility if the school district made FAPE available to the child and the parents chose to place the child in the private school or facility. Generally, "no private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.454(a).

Parents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the child's private placement do so at their own peril, as there

[5] 20 U.S.C. § 1412(a)(10)(C).

is no guarantee that they will win. *Burlington*, *supra*, 471 U.S. at 374. Reimbursement is permitted only where it is determined after a hearing that the services offered by the school district are inadequate or inappropriate, the services chosen by the parents are appropriate, and equitable considerations support the parents' claim. *See* 20 U.S.C. § 1412(a)(10)(C)(ii)[6]; 34 C.F.R. § 300.403(C).

II. Factual Background.

Tom F. ("respondent") is the parent of a child, Gilbert F., who resides in petitioner's School District. The student, who was born on October 1, 1989, has never received special education services from the New York City Department of Education ("Board") or any other public agency (A5, A238, A243-244).[7] Since the time that the student was eligible to receive public education in 1995, the student attended the Stephen Gaynor School ("Gaynor"), a private school which is not approved by the Commissioner of Education of the State of New York for the provision of special education services to students with disabilities (A5). Prior to Gaynor, the student attended Washington Market School, a pre-kindergarten private school (A243).

The student was initially referred to be evaluated by the Board's Committee on Special Education ("CSE") where annual evaluations are conducted and IEPs are promulgated. The student was found to be learning disabled (A175) and received annual evaluations by the CSE in 1997 and 1998. Both times, respondent refused the recommended public

[6] This subsection of the IDEA has not been modified since the 1997 Amendments.

[7] Numbers in parentheses preceded by the letter "A" refer to pages in the Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

placement and services and, instead, sued the Board for tuition reimbursement under *Florence County Sch. Dist. Four et al. v. Carter*, 510 U.S. 7 (1993), alleging procedural violations. Each time the Board elected to settle for purposes of avoiding litigation, and agreed, *inter alia*, to reimburse appellant for the cost of the student's tuition at Gaynor (A5-11, A14-20). In neither case was the issue of placement ever reached.

The CSE scheduled the IEP review for May 28, 1999, but the review was postponed due to the unavailability of a parent member (App. 70a). A parent member (*i.e.*, an additional parent of a student with a disability residing in the school district) is a required IEP team member under New York State law, and failure to include the parent member would invalidate the IEP under current SRO precedent. The attendance of a parent member may be completely waived by the parent, but respondent chose not to do so.

The student's annual review was delayed until the CSE reconvened on June 23, 1999, and conducted the annual review of the student's appropriate educational placement for the 1999-2000 school year (A55-57). Before the annual review was to take place, Gaynor informed the CSE that the school would be closed on June 23rd but that the school staff would be present at the school (A54-55).

Seven people attended the CSE meeting, including respondent parent, a law clerk from the office of the parent's attorney, the district representative from the Board, an educational evaluator from the Board who was asked to serve as the special education teacher, the Board's general education teacher, a parent member, required by State

regulation and funded by the Board, and a school psychologist from the Board (A74, A150). The CSE attempted to contact the student's private school special education teacher from Gaynor during the annual review, in the hope that the special education teacher could participate, but the CSE was advised that no one from Gaynor was available to participate (A66-67). The student's special education teacher was in the hospital and was not in attendance at the school on June 23rd. (Pet. App. 2, A279).

Since the child's actual special education teacher at Gaynor was unavailable to participate at the CSE review, the CSE educational evaluator served in the role of the special education teacher for purposes of the review (A74). The educational evaluator believed that a Modified Instructional Services-I ("MIS-I") program was appropriate for the student because he would benefit from multi-motor methods of instruction (A110-111). At the review, the educational evaluator described the proposed MIS-I program for respondent (A140).

The CSE team developed an IEP for the child after completing a review of the child's speech and language evaluation, a midyear progress report, a psychological evaluation, an educational evaluation, and an occupational therapy evaluation (App. 66a-71a, A86-89, A93). It was recommended that the student continue to be classified as learning disabled and be placed in a MIS-I program with a teacher ratio of 15:1 (App. 70a). The CSE additionally recommended that the student receive speech/language therapy in a group twice per week, and counseling in a group once per week (App. 70a).

The student's Final Notice of Recommendation, recommending the student's placement at the New York City Lower Lab School for Gifted Education, was sent to respondent on July 29, 1999 (App. 70a, A147). Respondent never visited the school, never met with any representatives from the school, and never met with the placement officer at the CSE (A238, A247). At the impartial hearing, respondent testified that if the Board offered the child a placement prior to the end of the 1998-1999 school year, he would have observed the placement (A237).

Respondent acknowledged that he has never visited any public school placement that the CSE has offered the student in the past (A238). Respondent testified that he had already decided to again enroll the student at Gaynor and had tendered a payment to Gaynor. When asked whether he had looked at the MIS I program that the Board recommended, respondent replied, "Well, it was sort of a moot point. We were gone for the summer. I spent the summer in California. Plans had been made for the following year. The down payment had been made . . . ." (A247).

Respondent rejected the placement at the New York City Lower Lab School for Gifted Education, and chose instead to continue the student's education at Gaynor for the 1999-2000 school year. Respondent thereafter brought an administrative complaint against the Board, requesting an impartial hearing seeking tuition reimbursement for his unilateral placement of the student in the Gaynor School for the 1999-2000 year (App. 70a). The student's tuition at Gaynor for the 1999-2000 school year was $21,819.

III. Procedural History.

The impartial hearing was held on January 21, January 31 and February 29, 2000, before an Impartial Hearing Officer ("IHO"), and eight witnesses testified (App. 16a-38a). Testifying on behalf of the Board were the Special Education Teacher of the student's recommended MIS-I program at the New York City Lower Lab School for Gifted Education, the CSE School Psychologist, and the CSE Educational Evaluator. Respondent testified on his own behalf, along with respondent's attorney's Law Clerk, Gaynor's Head Teacher, Gaynor's Speech and Language Pathologist, and Gaynor's Reading Teacher.

In developing the IEP, the CSE conducted the student's educational evaluation, the social history report, speech and language evaluations (which included a consideration of the speech and language evaluation conducted the prior year), an occupational therapy assessment and a psychological report. The CSE also performed an observation at the private school. The CSE also considered the private school progress reports submitted by Gaynor (A171-173, A175-192, A200-222). The parent brought in a two-page medical evaluation, which the CSE considered (A223). The CSE additionally considered a psychological evaluation conducted on or about April 10, 1999, which indicated that the student is friendly, pleasant and quiet (A46-48, A193-194).

The psychologist who conducted the student's classroom observation testified that with regard to intellectual testing, the student did not demonstrate any relative weaknesses, and demonstrated relative strengths in the area of verbal abstract reasoning and his general fund of information and being able to sequence (A47-48). The psychologist testified that the

student scored below average in perceptual motor development, and on his emotional tests demonstrated needs in the areas of self-confidence and self-esteem (A47).

The psychologist stated that the psychological evaluation findings were consistent with the Gaynor mid-year teacher report (A12). With respect to the child's classroom observation, the psychologist testified that the student participated in the class activities, appeared appropriate in his group and appeared to be quite attentive to what was going on in the class (A16, A78-79). The psychologist was of the view that the student needed a self-contained class where issues of attention and academic weaknesses could be addressed (A50). The psychologist also recommended counseling to address the child's self-confidence and self-esteem issues (A50-51).

The special education teacher of the recommended MIS-I class at the New York City Lower Lab for Gifted Education ("MIS-I teacher") is board certified in the areas of elementary education and special education, has taught special education for approximately five years, and has taught special education in a MIS-I classroom for two years (A316). The MIS-I teacher familiarized herself with the student by studying the student's IEP (A316). The MIS-I teacher testified that the proposed class had the capacity for fifteen students, but had only nine students registered at the time of the impartial hearing (A318-320).

Describing the CSE's proposed placement, the MIS-I teacher noted that the children's reading levels range from high kindergarten level to high third grade, and that their math levels range from high kindergarten to fourth grade (A319, A336). The MIS-I teacher testified that to address

the range of reading levels, she practices private reading and has individualized reading groups based upon a student's instructional reading levels (A321). She additionally advised that the reading program is a balanced literacy program and includes the following daily activities: reading aloud, interactive writing, shared reading, guided reading, and a writer's workshop (A320-321).

The MIS-I teacher explained that in math, the majority of students in the proposed class were functioning between the 2nd and 3rd grade level, with one child functioning at the fourth grade level (A320). She said that the child who was functioning at the fourth grade level was mainstreamed for math in a general education class (A328, A336-337).

In describing the math curriculum, the MIS-I teacher testified that she administers the Turk program, a hands-on curriculum where children work individually or in pairs to solve problems and thereafter meet in a circle to discuss strategies used and different strategies available in solving the problems (A324, A337). Based upon her review of the child's IEP, the MIS-I teacher felt that the student would fall at the higher end of her class academically, but also noted that there are other children in her class who are at the student's academic level (A326). Based upon her review of the child's IEP, the MIS-I teacher believed that the CSE's recommended placement was appropriate (A329).

The educational evaluator, who also served as the special education teacher, advised at the CSE meeting that she was familiar with the student and viewed all of the student's records at the review (A96). She testified that the child's educational problems were greatest in the area of reading, and particularly in reading comprehension (A97, A99).

In particular, the student's reading comprehension score was grade equivalent to 2.5 and his decoding score was equivalent to 3.5 (A203). She stated that, on the other hand, the student's strongest area was math, where his math computation score was grade equivalent to 4.2 and his math application was grade equivalent to 3.6 (A100, A203).

The educational evaluator testified that the CSE team recommended speech and language therapy services because the student's listening comprehension and oral narrative skills were below average, despite the fact that the student's speech and language evaluator did not recommend the services (A105-107). She testified that the MIS-I program's use of multi-sensory methods of instruction would be appropriate to meet the child's demonstrated learning disability, and further advised that the MIS-I's smaller class size and trained special education teacher were necessary to address his attention issues (A109-111).

The educational evaluator testified that the child should be with non-disabled peers during non-academic activities and took the view that a self-contained private school environment would be too restrictive for the child (A111-112).

Respondent acknowledged that his son has never attended public school in his educational career (A238). Respondent also admitted that he never visited any public school placement that the CSE offered the student in the past (A238). Respondent claimed, however, that he would have gone to visit the proposed placement had it been offered prior to the end of the 1998-1999 school year (A236-237). Respondent also testified that by the time he received the proposed placement in early August, he was in California

and plans had already been made for the child for the 1999-2000 school year. Respondent claimed that it was a "moot point" for him to look into the proposed placement (A247).

The head teacher at Gaynor advised that the student's class consists of eight students, all boys, with one teacher and an assistant, opined that the student's IEP was "on target," and claimed that Gaynor is addressing the student's needs and goals as set forth in the IEP. As to the recommended placement's class size, the head teacher noted that it takes the student a long time to warm up to and trust a teacher, and testified "I think 15 children could be a bit overwhelming. It's not too much of a change but I think that just one teacher would be overwhelming" (A263-265, A 273-274).

Gaynor's reading teacher advised that the student has difficulty with reading comprehension, and testified that she provides weekly reading sessions in a group of two. She believes that the student needs small group reading sessions and has benefited from it (A359-361).

Gaynor's speech and language pathologist admitted that she never conducted a speech and language therapy evaluation, nor did she review the speech and language therapy evaluation conducted by the CSE (A351-352). Nonetheless, she testified that the student has expressive and receptive difficulties requiring speech and language therapy services (A348-349).

On April 6, 2001, the IHO issued his Findings of Fact and Decision (App. 16a-38a). In that decision, the IHO found that the Board did not meet its burden of showing that its recommendation was appropriate. In determining that the Board's placement was not appropriate, the IHO found that

the IEP was procedurally defective because the child's actual special education teacher from Gaynor, whose attendance the Board is not empowered to compel, did not attend the child's IEP review meeting held on June 23, 1999, and that the child was not appropriately grouped for math in the recommended MIS-I program. The IHO also determined that Gaynor provided an appropriate program for the student.

Thereafter, the Board appealed the IHO's decision to the State Education Department State Review Officer ("SRO") (A410-428). In that appeal to the SRO, the Board argued that the IHO incorrectly held that the IEP meeting was not properly constituted, that the proposed placement was reasonably calculated to confer educational benefits for the student, and that respondent was not entitled to tuition reimbursement because equitable considerations favor the Board (A421).

The Board argued that as a matter of equity and law, the tuition reimbursement should be denied on the ground that respondent had no intention of placing the student in a public school program, irrespective of its appropriateness (A426). In support, the Board noted that, pursuant to the IDEA, tuition reimbursement was limited to "parents of a child with a disability, who previously received special education and related services under the authority of a public agency" (A426).

The SRO issued a decision granting respondent's request for tuition reimbursement and dismissing the Board's appeal on March 30, 2001 (App. 66a-76a). In doing so, the SRO determined, *inter alia*, that the Board failed to demonstrate that its recommended placement was appropriate.

In reaching that determination, the SRO concluded that the CSE was improperly constituted because it was not comprised of at least "one special education teacher, or where appropriate, at least one special education provider of such child" as provided by 34 C.F.R. § 300.314(a). In interpreting that regulation, the SRO found that the Board had three options in selecting an individual to serve as the student's special education teacher: (1) it could have had the student's private school teacher serve as the special education teacher member of the CSE; (2) the special education teacher on the CSE could have been a special education teacher who would have been likely to implement the student's IEP; or (3) the student's speech/language therapist could have served as the special education teacher member of the CSE. The SRO further asserted that a CSE member designated to serve as a special education teacher must be qualified to provide significant guidance to the CSE about the student's ability to successfully function in the program or programs that the CSE believes may be appropriate prior to the CSE review.

After reviewing the educational evaluator's testimony, the SRO held that "the educational evaluator could not serve as the student's special education teacher on the CSE since she could not provide the kind of knowledge of the student or the recommended program that I must assume was intended by the [IDEA Amendments of 1997] and its regulations" (App. 74a).

Finding that the Board failed to demonstrate the appropriateness of its recommended placement, the SRO did not reach the Board's other challenges to the IHO's findings regarding grouping and mainstreaming. As to the Board's contention that respondent is barred from receiving an award of tuition reimbursement because the student has never

received special education services from a public agency, the SRO denied the Board's challenge and relied on prior decisions which refused to reach the argument. The SRO also noted that, in its view, the record did not demonstrate that respondent failed to cooperate with the CSE.

On July 26, 2001, the Board filed a complaint in the United States District Court for the Southern District of New York, alleging violations of 20 U.S.C. §§ 1400 *et seq.* and challenging the SRO's decision. On March 29, 2002, the Board moved for an order pursuant to FRCP 56(b), granting summary judgment in favor of plaintiff. On June 12, 2002, respondent moved for an order striking a supporting declaration in support of plaintiff's motion for summary judgment as improper under FRCP 56(e), and for an order pursuant to Rule 56(b) of the FRCP, granting summary judgment in favor of defendant. On January 3, 2005, the district court (Daniels, J.) issued a memorandum and order (one paper) granting summary judgment in favor of the Board and dismissing all of respondents' claims (Pet. App. 2-13).

On January 31, 2005, Mr. F. filed a notice of appeal in the United States Court of Appeals for the Second Circuit. After the matter was fully briefed and was calendared for oral argument, the Court of Appeals noted that what appeared to be the dispositive issue was likely to be resolved by the Second Circuit's pending decision in *Frank G. v. Bd. Of Ed. Of Hyde Park* which had previously been argued, and invited the parties to waive oral argument. Consequently, no argument was heard in the instant matter.

On July 27, 2006, the Court of Appeals issued an opinion and order in *Frank G. v. Bd. Of Ed. Of Hyde Park*, and on

August 9, 2006, the Court of Appeals vacated and remanded for further proceedings the judgment of the district court in the instant matter, in light of the opinion and order in *Frank G. v. Bd. Of Ed. Of Hyde Park.*

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals for the Second Circuit would permit parents who have never given the local educational agency an opportunity to provide FAPE to their child to invoke the protections of the same remedy that is available to the parents who have given the public entity a chance to do so. There is no support in the language of the statute or in the legislative history for an interpretation under which a parent could obtain tuition reimbursement without ever trying the public placement.

20 U.S.C. § 1412(a)(10)(C)(ii) was added to the IDEA as part of the 1997 amendments, and authorizes tuition reimbursement to the parents of a disabled child "who previously received special education and related services under the authority of a public agency." The statutory language is clear on its face and should be strictly construed. 20 U.S.C. § 1412(a)(10)(C)(ii) may be properly viewed as establishing a prerequisite for parents to recover tuition reimbursement when enrolling their child in a private school without the consent of the school district. The Court of Appeals' reading of 20 U.S.C. § 1412 (a)(10)(C)(ii) renders the language "previously received special education and related services" a nullity and should be rejected.

By adding a section entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency," the 1997 reauthorization of

the IDEA clarified the circumstances under which tuition reimbursement would be available and the degree of parental cooperation that is required. Through the addition of the language at issue here, Congress restricted the availability of reimbursement and provided that tuition reimbursement for a unilateral parental placement may be available only when the student "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii).

The IDEA is not intended to promote its broadest goals at the expense of all other policy considerations. The 1997 amendments to the IDEA reinforced the principle that children should not be unnecessarily removed from regular educational environments. Both the plain language of the statute and the IDEA's legislative history demonstrate Congress's intent that children with disabilities be educated with nonhandicapped children whenever possible, and Congress's intent to restrict the availability of reimbursement for private school tuition. The Court of Appeals erred by failing to consider the IDEA's express purpose of mainstreaming children with disabilities.

Moreover, the language of 20 U.S.C. § 1412 (a)(10)(C)(ii) does not provide clear notice that Congress intended to impose upon the States the economic burden of reimbursing parents for unilaterally placing their children in private schools. The language of statutes derived from Congress's Spending Power must be construed strictly according to the plain meaning of their terms in order to avoid burdening the States with obligations that they did not anticipate. The determination of the Court of Appeals imposes an economic burden, not contemplated by Congress,

upon local schools implementing the IDEA. A rule that permits parents to unilaterally place their children in private schools, and then seek tuition reimbursement from the public entity, stands in contradiction to the plain language of the statute and the intent of Congress.

The Court of Appeals erred in failing to narrowly interpret 20 U.S.C. § 1412(a)(10)(C)(ii) in accordance with the plain language of the statute and the policy considerations underlying its enactment.

ARGUMENT

I. The Plain Language Of 20 U.S.C. § 1412(a)(10)(C)(ii) Should Be Strictly Construed To Preclude Tuition Reimbursement Where The Student Has Not Previously Received Special Education And Related Services From A Public Agency.

Proper respect for the legislative powers vested in Congress implies that statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. *United States v. Albertini*, 472 U.S. 675, 680 (1985).

The Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992). The Court has further recognized that when the statutory language is plain, "the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according

to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)).

The clear meaning of the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) is that where a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from the parent's unilateral placement of the child in private school. The plain language of the statute creates a statutory threshold condition that must be met before the parent becomes eligible for tuition reimbursement.

The 1997 amendments expressly limit the availability of tuition reimbursement to children who received special education services from the public school before their parents enrolled them in private school. Congress could have made explicit in the statutory language of the IDEA that tuition reimbursement would be available to the parent of a child who has never previously received special education and related services from a public agency, but Congress did no such thing.

The Court of Appeals' decision is contrary to the clear intent of Congress. The Court of Appeals' reading of 20 U.S.C. § 1412 (a)(10)(C)(ii) renders the language "previously received special education and related services under the authority of a public agency" a nullity and conflicts with the rule of statutory construction which disfavors interpretations of statutes that render statutory language superfluous. *Connecticut National Bank v. Germain*, *supra*, 503 U.S. at 253.

The holding of the Court of Appeals in *Frank G. v. Board of Education of Hyde Park*, 459 F.3d 356 (2d Cir. 2006), is in direct conflict with the analysis of the First Circuit in *Greenland School District v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004), which correctly recognized that the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) creates a threshold requirement that tuition reimbursement is only available for children who have previously received special education and related services while in the public school system.

In contrast, the Second Circuit found that the plain language of the statute, if strictly followed, would lead to an absurd result because a child might have to languish in an inappropriate placement for a "wasted year of actual failure." The Court of Appeals' assumption appears to be premised upon the notion that the public entity is unable to provide an appropriate education in the first place, and is incapable of reaching a speedy determination of the inappropriateness of the public placement where it is, in fact, inappropriate. There is, however, no basis in fact for an assumption that clearly discounts the expertise of school officials who are charged with the responsibility of performing their obligations under the Act.

In interpreting the "previously received" language, the Court of Appeals assumed that the IEP will be inappropriate and will jeopardize the child's health and education. App. 105a. The IDEA does not require that a child would have to be enrolled for any [illegible] period of time in the school district's proposed placement prior to a unilateral private placement. Instead, the statute simply requires that the parent first give the public school's placement a try, which can hardly be characterized as an absurd result.

The Court of Appeals' reading is inconsistent with this Court's recognition that an IEP may not be presumed to be invalid until the parent demonstrates otherwise. *Schaffer v. Weast*, 546 U.S. 49 (2005). In *Schaffer*, the Court noted that the petitioners "in effect ask this Court to assume that every IEP is invalid until the school district demonstrates that it is not. The Act does not support this conclusion. IDEA relies heavily upon the expertise of school districts to meet its goals." *Schaffer*, 126 S. Ct. at 536. We respectfully submit that the Court, following the *Schaffer* decision, should direct courts to presume that public school officials properly perform their responsibilities under the Act, unless it is shown otherwise.

In finding the statutory language ambiguous, the Court of Appeals asserted that the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii):

> does not say that tuition reimbursement is *only* available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents whose child had not previously received special education and related services (emphasis in original).

Frank G. v. Bd. Of Ed. Of Hyde Park, *supra*, 459 F.3d at 368. App. 97a. Nevertheless, that is precisely what the "previously received" language means. It is respectfully submitted that the "previously received" language contains no ambiguity.

Contrary to the Court of Appeals' determination, the language of § 1412(a)(10)(C)(ii) is consistent with the plain

language of § 1412(a)(10)(C)(i), which limits the obligation of the local educational agency to pay for the cost of private school tuition. Read together, those sections demonstrate Congress's clear intent to define and limit the circumstances under which tuition reimbursement would be available. The Court of Appeals also found that it is unclear from the fact that § 1412(a)(10)(C)(ii) provides for parental reimbursement in one circumstance, that it excludes reimbursement in other circumstances. App. 101a. Yet that is exactly the purpose of the limiting language of the section.

The Court of Appeals' departure from a strict reading of the plain language of the statute was also based on an understanding that a district court hearing a challenge to the failure of a local educational agency to provide FAPE is authorized to "grant such relief as [it] determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). The Court of Appeals noted that the language of § 1415(e)(2), which *Burlington* relied upon, was unchanged by the 1997 revision of the IDEA and continues to provide that the court "shall grant such relief as the court determined is appropriate" and found the re-enactment of § 1415(e)(2) without change to be "significant because it can be presumed that Congress intended to adopt the construction given to it by the Supreme Court and made that construction part of the enactment" (citations omitted). App. 100a.

Although the language of § 1415(e)(2), recodified as 20 U.S.C. § 1415(i)(2)(C)(iii), was unchanged by the 1997 amendments, the addition of § 1412(a)(10)(C)(ii) as part of the 1997 amendments should properly be viewed as limiting the relief that may be granted pursuant to § 1415(e)(2), which previously existed. To view § 1412(a)(10)(C)(ii) otherwise would render the language "previously received" as

surplusage. The Court of Appeals' reading implies that Congress enacted a provision with no practical effect. This result should be avoided.

Moreover, the Court of Appeals' reading would subvert the intent of Congress to limit the circumstances under which tuition reimbursement would be permitted, and would allow a district court to grant relief in any circumstance. Such a reading would permit a court to ignore the limiting language of the 1997 amendments by permitting a parent to receive tuition reimbursement without ever trying the public school program, which we respectfully submit would produce an absurd result.

The Court of Appeals, having found the statutory language to be ambiguous, also referred to a policy letter prepared by the Department of Education's Office of Special Education & Rehabilitative Services, which the court found to be consistent with its own construction of the statute. A review of that letter, however, reveals that it contains no analysis of the statute. Moreover, as the language of the statute is unambiguous, there is no requirement that such a letter be shown deference.

The Court of Appeals found that "[w]hether 20 U.S.C. § 1412(a)(10)(C)(ii) . . . was intended to eliminate the power of a district court to grant the relief" available under § 1415(e)(2) "involves a question to which the IDEA does not provide an unambiguous answer." If, in fact, an ambiguity exists, then the statute does not provide the "clear notice" required under the spending clause. *See Arlington*, *supra*.

It is respectfully urged, however, that there is no ambiguity. A district court's authority to grant equitable relief

should not extend to include the power to grant relief that is not permitted under the limiting language of § 1412(a)(10)(C)(ii). To permit a district court to do so clearly renders Congress's "previously received" language a nullity. Consequently, in the absence of ambiguous statutory language, a resort to the canons of statutory construction is unwarranted.

II. The Plain Language Interpretation Of 20 U.S.C. § 1412(a)(10)(C)(ii) Which Precludes Tuition Reimbursement Is Consistent With The Legislative History And Policy Considerations Underlying The IDEA's Enactment.

The United States Congress first passed the IDEA as part of the Education of the Handicapped Act in 1970, Public Law 91-230, § 601 *et seq.* (1970). The Education of the Handicapped Act was enacted in response to the perception of Congress that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" House Report No. 94-332, 94th Cong., 1st Sess., at 2. The Court has recognized that the "IDEA was intended to reverse this history of neglect." *Schaffer*, *supra*, 546 U.S. at 52.

In 1974, Congress greatly increased federal funding for the education of the handicapped, and required States receiving those funds to adopt "a goal of providing full educational opportunities to all handicapped children." Public Law 93-380, 88 Stat. 579, 583 (1974). Following a year of study, in 1975 the Education of the Handicapped Act was substantially amended in the Education for All Handicapped Children Act, Public Law 94-142 (1975). The Education for

All Handicapped Children Act guaranteed a free, appropriate public education for children with disabilities. *Board of Education v. Rowley*, *supra*, 458 U.S. at 179.

The IDEA foresees state implementation of federal standards. § 1412(a); *Cedar Rapids Community School Dist. v. Garret F.*, 526 U.S. 66, 68 (1999). As a matter of policy, Congress intended to make public education available to handicapped children with a goal of mainstreaming them into the public educational system. The Court has recognized that, on its face, "the statute evinces a congressional intent to bring previously excluded handicapped children into public education systems of the States." *Board of Education v. Rowley*, *supra*, 458 U.S. at 189.

States that receive funds under the Act must, in order of priority, first provide education to handicapped children who are not receiving an education, and second to the most severely handicapped children who are receiving an inadequate education. 20 U.S.C. § 1412(3). States must also, to the maximum extent appropriate, educate handicapped children with children who are not handicapped. 20 U.S.C. § 1412(5). Recognizing, however, that the nature or severity of some handicaps may be such that education in regular classes cannot be satisfactorily accomplished with the use of supplementary aids and services, the Act provides for the education of some handicapped children in separate classes or institutional settings. 20 U.S.C. §§ 1412(5); 1413(a)(4).

This Court has noted that "[t]he Act requires participating States to educate handicapped children with nonhandicapped children whenever possible. When that 'mainstreaming' preference of the Act has been met and a child is being educated in the regular classrooms of a public school system,

the system itself monitors the educational progress of the child." *Board of Education v. Rowley*, *supra*, 458 U.S. at 202-203.

The IDEA has historically recognized that some children may have been placed in private school by the public agency, while others are placed unilaterally by their parents. As a result, the IDEA contains a subsection that governs the States' obligations to "Children in Private Schools." 20 U.S.C. § 1412 (a)(10). The statute makes a distinction between children who are placed in or referred to private schools by the public entity and children who are unilaterally placed by the parents. Where the children are placed in or referred to private schools by the public entity, the agency assumes the cost. 20 U.S.C. § 1412(a)(10)(B). Such placement through the public school district is considered a public placement or program. *Burlington*, *supra*, 471 U.S. at 369-370. Where children are unilaterally placed in private schools by their parents, the availability of reimbursement is restricted. 20 U.S.C. § 1412(a)(10)(C)(ii).

In 1985, the Court held that the remedy of tuition reimbursement was authorized under 20 U.S.C. § 1415(e)(2).[8] In *Burlington*, *supra*, 471 U.S. at 369, the Court noted that the Act confers on the reviewing court the authority to receive records of the administrative proceedings and hear additional evidence at the request of a party "and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determined appropriate. § 1415(e)(2)."

In *Burlington*, *supra*, the Court determined that under the narrow circumstance where a parent unilaterally obtains

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[8] Recodified as amended 20 U.S.C. § 1415(i)(2)(C)(iii).

and pays for special education services to which it is ultimately determined the child was entitled, the parent may be entitled to reimbursement, noting that the IDEA "contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children" and also provides for placement in private schools at public expense where this is not possible. *Burlington Sch. Comm. v. Dep't of Educ.*, *supra*, 471 U.S. at 369. *See also Florence County Sch. Dist. Four et al. v. Carter*, *supra*, 510 U.S. at 15. It should be noted that in *Burlington*, the child was already receiving education in the public school system when it was determined that he needed special education and related services. 471 U.S. at 361.

The IDEA sets forth eligibility requirements for States that desire financial assistance under the Act. 20 U.S.C. §§ 1412, 1413. The Act establishes procedures for the identification, evaluation, and educational placement of disabled children and also establishes procedural safeguards to protect disabled children and their parents. §§ 1414, 1415. Among these procedural safeguards is the right of parents to seek remedial relief with regard to their children's education, as well as the court's ability to award such relief as is deemed appropriate. 20 U.S.C. § 1415(i)(2)(C)(iii), formerly codified at 20 U.S.C. § 1415(e)(2).

Reimbursement of private school tuition is limited to situations where it has been determined after a hearing that the services offered by the school district are inadequate or inappropriate, the services chosen by the parents are appropriate, and equitable considerations support the parents' claim. *See* 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.403(C). Even where tuition reimbursement is

authorized under the IDEA, the parents must show that the school district is incapable of providing FAPE and that the private school placement is proper. *Florence County Sch. Dist. Four et al. v. Carter, supra*, 510 U.S. at 13-15. Those conditions serve the public interest that public funds not be spent to support inappropriate private placements. *See* 64 Fed. Reg. 12602 (March 12, 1999) (discussion of comments to 34 C.F.R. § 300.403(C)).[9]

The statute has continued to evolve according to congressional policy and, accordingly, the IDEA was reauthorized by Congress in 1997. As with other reauthorizations of the statute, the 1997 reauthorization of the IDEA changed prior requirements and added new ones. The Report of the House Committee on Education and the Workforce explained that "[t]he bill makes a number of changes to clarify the responsibility of public school districts to children with disabilities." House Report No. 105-95, 105th Cong., 1st Sess., at 92 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 90. Those changes serve to define the rights of disabled children and their parents, and the responsibilities of local educational authorities with regard to the education of those children.

Toward that end, the 1997 amendments further clarified the degree of parental cooperation required when it added a

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[9] Several circuits have held that reimbursement for private school tuition was dependent upon the parent cooperating with the school authorities with regard to placement and the child's education plan. *See, e.g., Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 523 (6th Cir. 2003). The Second Circuit has held that reimbursement is barred in circumstances where the parents unilaterally arrange for private education services without ever advising the school board that they are dissatisfied with the child's IEP. *M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 68 (2d Cir. 2000).

section entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency."[10] That section opens with a general policy statement that explains that the IDEA "does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. § 1412(a)(10)(C)(i).

The addition of 20 U.S.C. § 1412 to the Act is explained in House Report No. 105-95:

> Section 612 [20 U.S.C. § 1412] also specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). Previously, the child must have received special education and related services under the authority of a public agency.

House Report No. 105-95, 105th Cong., 1st Sess., at 92 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 90.

The Department of Education's comments to the proposed regulation of the IDEA in the Federal Register

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[10] 20 U.S.C. § 1412(a)(10)(C); *see* House Report No. 105-95, 105th Cong., 1st Sess. at 93, *as reprinted in* 1997 U.S.C.C.A.N. 78, 90. *See Gary S. v. Manchester Sch. Dist.*, 241 F. Supp.2d 111, 114-15 (D.N.H. 2003).

confirm that the bill clarified the responsibilities of the local educational authorities:

> The IDEA Amendments of 1997 added new requirements concerning children placed by their parents in private schools. Section 612(a)(10)(C)(i) provides that an LEA is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the LEA made FAPE available to the child and the parents elected to place the child in the private school.

62 Fed. Reg. 55042 (October 22, 1997).

The 1997 amendments both clarified the circumstances under which tuition reimbursement would be available, and restricted the availability of that remedy by adding language providing that tuition reimbursement for a unilateral parental placement is available when the student "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii). That language was also added to the applicable implementing regulations for IDEA, at the same time. 34 C.F.R. § 300.403(C). 34 C.F.R. § 300.403 states, in relevant part:

> (a) *General.* This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility.

> (c) *Reimbursement for private school placement.* If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.

The Department of Education's interpretative guidance to 34 C.F.R. § 300.403 clarifies that tuition reimbursement is only available on claims "made before a child is removed from a public agency placement." 64 Fed. Reg. 12601 (March 12, 1999).

Thus, the 1997 amendments expressly limit the availability of the tuition remedy to children who received special education services at the public school before their parents enrolled them in private school. The legislative history indicates that this was a limitation that Congress intended to adopt. *See* 34 C.F.R. § 300.403; House Report No. 105-95, 105th Cong., 1st Sess., (1997) *as reprinted in* 1997 U.S.C.C.A.N. 78, 90.

The IDEA's history and the 1997 reauthorization of that statute demonstrate that Congress intended to limit the right of parents of children with disabilities to seek private school reimbursement as a remedy under the statute. The addition of 20 U.S.C. § 1412 (a)(10)(C)(ii) as part of the 1997

reauthorization demonstrates a policy determination, made at the discretion of Congress, to establish a threshold requirement for a claim of tuition reimbursement: that the child had previously received special education and related services from the public entity.

This was accomplished, in part, by the elimination of "inappropriate financial incentives for referring children to special education." It is clear beyond cavil that one specific purpose of the 1997 amendments was to control government expenditures for students voluntarily placed in private schools by their parents. *Id.* at 91-92.

The 1997 amendments reinforced the principle that children should not be unnecessarily removed from regular educational environments. 20 U.S.C. § 1412(a)(5)(A). That purpose was recognized by the Court of Appeals for the First Circuit, which noted that the 1997 Amendments "reinforced the principle that children should not be removed unnecessarily from regular education environments, in part by eliminating 'inappropriate financial incentives for referring children to special education .... One specific purpose of the amendments was to control government expenditures for students voluntarily placed in private schools by their parents (citations omitted)." *Greenland School District v. Amy N., supra,* 358 F.3d at 152. *See also* House Report 105-95, 105th Cong., 1st Sess., at 90 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 87.

School districts must be given an opportunity to cure any alleged deficiency. To that end, the IDEA requires notice that special education is an issue in order for parents to bring a claim for tuition reimbursement. 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa). *Greenland, supra,* 358 F.3d 150;

see also Berger v. Medina City School District, 348 F.3d 513 (6th Cir. 2003) (reimbursement may be reduced or denied where parents did not comply with notice requirements under the IDEA). The Court of Appeals for the First Circuit recognized that those statutory provisions demonstrate Congress's intent that before parents place their child in private school, they must at least give notice to the public entity that special education is at issue. The First Circuit found that this "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided" in the public schools. *Greenland, supra*, 358 F.3d at 160. [11, 12]

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[11] Of course, in the instant case the child was never enrolled in public school and, consequently, the parent did not provide the Board with notice of removal.

[12] The IDEIA or "New IDEA" provisions went into effect in July 2005. 20 U.S.C. § 1415 *et seq*. One of the new provisions specifically calls for a "last chance meeting" between the local educational agency and the parents before the parents seek an impartial due process hearing. The enactment of that provision can only be read as Congress' continuing attempt to address the situation of parents unilaterally withdrawing their children from local public educational agencies without allowing those agencies the opportunity to resolve the parents' complaint. 20 U.S.C. § 1415(f)(1)(B).

The enactment of 20 U.S.C. §§ 1415(f)(3)(E) and 1415 (f)(3)(F), providing that procedural violations in creating an IEP do not *per se* render the IEP legally inadequate and do not constitute a denial of FAPE, further demonstrates Congress's intent to limit the circumstances under which tuition reimbursement may be granted where the child is unilaterally placed in private school by the parent.

Here, the Court of Appeals correctly determined that one express purpose of the IDEA is to ensure that a free appropriate public education is available to all children with disabilities. Having done so, however, the Court of Appeals failed to consider another express purpose of the IDEA, which is to educate handicapped children with nonhandicapped children whenever possible.

The Court of Appeals also ignored the fact that a specific purpose of the 1997 amendments was to control government expenditures for students voluntarily placed in private schools by their parents. This Court has noted, for example, that "Congress has also repeatedly amended the Act in order to reduce its administrative and litigation-related costs. For example, in 1997 Congress mandated that States offer mediation for IDEA disputes (citation omitted)." *Schaffer*, *supra*, 126 S.Ct. at 535.

In *Arlington*, *supra*, the Court teaches that the broad, general goal of the IDEA of ensuring that a free appropriate public education is available to all children with disabilities does not trump all other considerations, noting that "[t]he IDEA obviously does not seek to promote those goals at the expense of all other considerations, including fiscal considerations." *Arlington*, *supra*, __ U.S. __, 126 S.Ct. at 2463.

The record shows that the child's proffered public school placement was at a gifted school, the New York City Lower Lab School for Gifted Education, one of the finest schools in the New York City public school system. The record demonstrates, however, that the parent had already predetermined that he was going to reject the public placement by the time it was offered. Thus this case does

not present a situation where a parent removes a child from public school and places the child in private school after trying, but failing, to obtain FAPE. *See* 34 C.F.R. § 300.403. In the absence of a failure to provide FAPE, a remedy under § 1415(i)(2)(C)(iii) is inappropriate, and it is respectfully submitted that it is equally inappropriate to grant relief under that section when such relief should be properly disallowed because of a failure to meet the threshold requirements of §1412(a)(10)(C)(ii).

Public policy does not require that the parents of children who require special education and related services be reimbursed for unilaterally placing those children in private school, where the parent's rejection of the public placement is based upon mere speculation that it is inappropriate. Permitting reimbursement under those circumstances frustrates the policy of mainstreaming disabled children whenever possible, as exemplified by the circumstance of the child in this case, who has never even tried the educational plan developed by the public entity for a single day.

As the IDEA's legislative history demonstrates, Congress intended to limit tuition reimbursement as a remedy under the statute. This was accomplished through the 1997 reauthorization. Indeed, Congress's preference for public education is exemplified by the very language Congress chose in describing its goal: free appropriate *public* education. The Court of Appeals' decision does not further Congress's goal of educating disabled children alongside nonhandicapped children where the public entity is able to do so, and stands in contradiction of Congress's expressed preference for mainstreaming handicapped children. Allowing private

school tuition reimbursement under those circumstances encourages a departure from Congressional policy. Any interpretation of 20 U.S.C. §1412(a)(10)(C)(ii) that would permit tuition reimbursement to parents who have never allowed the public entity a first chance to provide a free appropriate public education to the child is contrary to a major policy consideration underlying Congress's enactment of the IDEA.

III. The Second Circuit's Holding Is In Conflict With The Spending Clause Because A Statute Emanating From Congress's Spending Power Must Provide Clear Notice Of The State's Obligation.

Congress is empowered to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. Const., Art. I, § 8, cl. 1. Congress has broad power to establish the terms on which it disburses federal money to the States. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987). Congress may attach conditions to the receipt of federal funds, and it uses its power to advance policy objectives by conditioning the receipt of federal funds upon the recipient's compliance with statutory and administrative directives. *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).

When Congress attaches conditions to a State's acceptance of federal funds, those conditions must be unambiguously set out, *Arlington*, *supra*, 126 S. Ct. 2455, because a law "that conditions an offer of federal funding on a promise by the recipient . . . amounts essentially to a contract between the Government and the recipient of funds."

Gebser v. Lago Vista Independent School Dist., 524 U.S. 274 (1998).

The Court has noted:

> The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.

Pennhurst State Sch. And Hosp. v. Halderman, 451 U.S. 1, 17 (1981). Accordingly, a court must narrowly interpret Spending Clause legislation, so that States are not burdened with unanticipated obligations. *Cedar Rapids Community School District v. Garret F., supra*, 526 U.S. at 84.

The IDEA was enacted by Congress pursuant to the Spending Clause. *See Schaffer, supra*, 546 U.S. at 51. In *Schaffer*, this Court noted that the IDEA is a Spending Clause statute that seeks to ensure that all children with disabilities have available to them a free appropriate public education. The IDEA provides federal funds to assist state and local agencies in the education of children with disabilities, and as a condition for federal financial assistance, States must comply with the extensive goals and procedures of the statute. *Board of Ed. v. Rowley, supra*, 458 U.S. at 179.

In the instant case, the Court of Appeals' decision is inconsistent with this Court's recent decision in *Arlington, supra*. The Court of Appeals left that decision unmentioned

and, indeed, made no mention at all of the Spending Clause. This was error.

As this Court held, the key in a Spending Clause case is "what the States are clearly told regarding the conditions that go along with the acceptance of [IDEA] funds." *Arlington*, *supra*, at 538. Fund recipients may be bound only by those conditions that are voluntarily and knowingly accepted. *See Pennhurst*, *supra*, 451 U.S. at 17. Conditions incident to the receipt of federal funds must be spelled out in the text of the statute in order to be enforceable in court. *Arlington*, *supra*, 126 S.Ct. at 2457-64.

If, in fact, the language of 20 U.S.C. § 1412 (a)(10)(C)(ii) is ambiguous in light of the potential relief available under § 1415(e)(2), that ambiguity defeats any claim that Congress unambiguously conditioned the receipt of federal funds in the manner asserted by respondent. In that case, the statute may be read as having improperly imposed obligations on States receiving federal funds pursuant to the IDEA that were unanticipated by them. An ambiguous statute by definition does not provide clear notice of the States' liability. States could not knowingly accept conditions of which they are unaware or which they are unable to ascertain.

Consequently, it is appropriate to view the IDEA from the perspective of a state official who would decide whether the State should accept IDEA funds and the obligations accompanying the acceptance of those funds. *Arlington*, *supra*. The question here is whether such a state official would clearly understand that one of the obligations imposed by the IDEA is an obligation to reimburse parents who unilaterally place their children in private school when those

children have never previously received special education and related services from the local educational agency.

It is respectfully submitted that no clear notice of such an obligation is provided by the Act. The language of 20 U.S.C. § 1412 (a)(10)(C)(ii) does not even hint that the acceptance of IDEA funds made local educational agencies responsible to reimburse parents for unilaterally placing their children in private schools. The text of 20 U.S.C. § 1412 (a)(10)(C)(ii) fails to provide the clear notice that is required under the Spending Clause to attach such a condition to a State's receipt of IDEA funds.

It is obvious that States could not anticipate having to incur the potentially enormous economic impact of having to reimburse parents who unilaterally placed their disabled children in private schools without having first afforded the local educational agency an opportunity to provide a free appropriate public education, especially where the plain language of the statute provides that the child must have previously received special education and related services from the public entity in order for the parent to be eligible for tuition reimbursement.

Given the magnitude of the potential economic impact upon the States if a parent may unilaterally place a child in private school when the public entity had made available a free appropriate public education, and may seek tuition reimbursement when the child has not previously received special education and related services from the local educational agency, it cannot be presumed that the States would have knowingly and voluntarily accepted such an obligation.

* * *

In sum, the plain language and legislative history demonstrate that Congress did not intend to impose burdens of unspecified proportions and weight upon the States in enacting the IDEA. *See Rowley*, *supra*, 458 U.S. at 176. The statute on its face requires that the child must have previously received special education and related services from the public entity in order for the parent to be eligible to receive tuition reimbursement for the child's private education. Accordingly, the Court should interpret 20 U.S.C. § 1412(a)(10)(C)(ii) in accordance with its plain language and the constitutionally mandated principles of construction applicable to Spending Clause legislation.

CONCLUSION

This Court should reverse the holding of the Second Circuit Court of Appeals that 20 U.S.C. § 1412(a)(10)(C)(ii) of the Individuals with Disabilities Education Act permits tuition reimbursement where a child has not previously received special education from a public agency.

Respectfully submitted,

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No. 06-637

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F., on behalf of GILBERT F., a minor,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the 1997 Amendments to the Individuals with Disabilities Education Act ("IDEA") created a categorical bar excluding children who have not previously attended a public school – but whose public school districts have failed to provide them with a free and appropriate public education – from receiving the long-established tuition reimbursement remedy authorized by IDEA and this Court's decisions in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) and *School Committee of Burlington, Mass v. Department of Education*, 471 U.S. 359 (1985).

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STATEMENT OF THE CASE

I. Statutory Background

This case presents the question of whether 1997 amendments to IDEA implicitly require that parents place their disabled children in inadequate and inappropriate public school placements for some indeterminate period of time in order to qualify for the private school tuition reimbursement remedy authorized by IDEA and this Court's decisions in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) ("*Carter*") and *School Committee of Burlington, Mass. v. Department of Education*, 471 U.S. 359 (1985) ("*Burlington*").

Congress enacted IDEA

> to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs . . . [,] to ensure that the rights of children with disabilities and parents of such children are protected[,] and . . . to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities. 20 U.S.C. §1400(d)(1).

Because "IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free," *Carter*, 510 U.S. at 13; *Burlington*, 471 U.S. at 372, a State's eligibility for IDEA funding is contingent on making available such an education "to all children with disabilities." 20 U.S.C. §1412(a)(1).

The "*modus operandi* of the Act" and "the core of the statute" is the "individualized educational program" ("IEP") "developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and where appropriate, the child." *Burlington*, 471 U.S. at 368;

Schaffer v. Weast, 126 S. Ct. 528, 532 (2005). The IEP is a "comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." *Burlington*, 471 U.S. at 368. As this Court recently stated in *Winkelman v. Parma City School District*, the IEP "sets the boundaries of the central entitlement provided by IDEA: It defines a "'free appropriate public education'" for that parent's child." 127 S. Ct. 1994, 2004 (2007).

Parents who believe that an IEP issued by a school district does not offer a "free and appropriate public education" ("FAPE") to their child are entitled, under IDEA, to "an impartial due process hearing" before a State educational agency at which they may raise "any matter relating to the identification, evaluation, or educational placement of the[ir] child, or the provision of a free appropriate public education to [their] child." In resolving a challenge to the adequacy of an IEP, a hearing officer must determine whether the proposed program offers the child "a free appropriate public education." "Any party aggrieved by the findings and decision" of the administrative tribunal may bring a civil action in state or federal court. 20 U.S.C. §§1415(f)(1)(A) and (E), (b)(6)(A), (i)(2)(A).

Where parents believe that a school district's IEP does not provide FAPE, they may enroll their child in private school and seek retroactive tuition reimbursement. If a court determines that a school district's IEP did in fact offer FAPE to the child, the parents will not receive tuition reimbursement. *Burlington*, 471 U.S. at 373; 20 U.S.C. §1412 (a)(10)(C)(i). Where a "court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act," however, parents are "entitled to [tuition] reimbursement." *Carter*, 510 U.S. at 15. In determining the amount of reimbursement, courts are

directed to factor in "equitable considerations," including whether "the cost of private education was unreasonable." *Id.* at 16.

II. Factual Background

A. Tom F. Gives Notice That Special Education Is At Issue And Fully Cooperates With The Board's Attempts To Provide FAPE

Gilbert F. was born on October 1, 1989, and lives with his father, Tom F., in New York City. When Gilbert was a toddler, his father observed behavior indicating that Gilbert might suffer from a learning disability. Medical tests and analyses – as well as evaluations later conducted by New York City Board of Education ("Board") specialists – confirmed that Gilbert suffered from attention deficit hyperactivity disorder and other learning disabilities. (A. 149, 223, 242).[1]

In 1996, Tom F. asked the Board to evaluate Gilbert and issue an IEP designed to meet his educational needs. Gilbert was subsequently tested and evaluated by Board psychologists, speech and language pathologists, occupational therapists, educational evaluators and special education teachers, and by the Board's Committee on Special Education ("CSE"). The CSE then issued an IEP classifying Gilbert as learning disabled and recommending that he receive speech and language therapy, counseling, and other services. (A. 175). Believing that the IEP proposed by the Board was inappropriate for Gilbert, Tom F. – in accordance with the procedures set forth in IDEA, *Carter*, and *Burlington* – arranged for Gilbert to be taught at the Stephen Gaynor School, a private school that specializes in educating children

[1] "J.A." refers to the Joint Appendix; "A." refers to the Joint Appendix filed in the Second Circuit; "Br." refers to Petitioner's merits brief.

with learning disabilities – and sought tuition reimbursement for the 1997-98 school year. The Board chose not to defend the adequacy of the IEP it had prepared for Gilbert, and instead entered into a settlement agreement with Tom F. in which it agreed to reimburse Gilbert's Gaynor tuition for that year. (A. 5, 11).

In 1998 – in preparation for the 1998-99 school year, the Board's psychologists, speech and language pathologists, and other special education experts again evaluated and assessed Gilbert, and the CSE issued another IEP. Tom F. concluded that this IEP was likewise inappropriate for Gilbert, and the Board again decided not to defend its adequacy, entering into a settlement in which it agreed to tuition reimbursement for the 1998-99 school year. (A. 14-20).

Throughout 1998 and the first half of 1999, Gilbert was again periodically tested, assessed, and observed by Board speech and language pathologists, psychologists, occupational therapists, and special education experts. On April 10, 1999, for example, Gilbert's skills in reading comprehension, reading decoding, spelling, and math computation were assessed; he received a new psychological evaluation and took IQ tests; and he was assessed by an occupational therapist and a speech and language pathologist. (J.A. 67a-69a).

On June 23, 1999, the Board's CSE met to consider the results of these assessments and to develop an IEP for Gilbert for the 1999-2000 school year. Tom F. attended and fully participated in this meeting.[2] (A. 150). Following this

[2] The Board notes (Br. 7) that the CSE's May 28, 1999 meeting was postponed "due to the unavailability of a parent member." The "unavailable" parent member was not Tom F., but the parent of another student with a disability whom the Board was required to have present. (J.A. 33a-34a); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.3(a)(1)(viii) (describing required composition of CSE).

meeting, the Board issued an IEP but recommended no specific placement for Gilbert. It was not until July 31, 1999, shortly before the beginning of the school year, that the Board informed Tom F. that Gilbert would be placed at P.S. 871.[3]

Tom F. believed that the Board's IEP for the 1999-2000 school year was inappropriate, in part because it directed that Gilbert – who was performing at a fourth-grade level in math – be assigned to either a class performing at kindergarten level or to a class of gifted fourth graders that would have exceeded Gilbert's skills and abilities. Accordingly, Tom F. requested an impartial review to determine the appropriateness of the placement, and Gilbert remained enrolled at Gaynor.[4]

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[3] The Board argues that Congress intended to "encourage mainstreaming of students wherever practicable," and that the Court of Appeals gave this factor insufficient weight. (Br. 2, 19, 27, 36-37). P.S. 871, the "New York City Lower Lab School for Gifted Education," did not offer a mainstreaming alternative to Gilbert, however. P.S. 871 was a school for *gifted* children, located in a building with two self-contained special education classes for disabled children, where Gilbert would have been taught. Indeed, the Board's IEP for the 1999-2000 school year states that "Gil's learning needs could not be address[ed] appropriately in the mainstream," and the hearing officer's decision notes that the Board never "indicated that Gilbert was to be mainstreamed." (A. 168; J.A. 34a). Accordingly, the Board's "mainstreaming" argument is a red herring. In any event, the mainstreaming goal cannot be used to frustrate IDEA's primary objective of providing FAPE to children with disabilities. *See Burlington*, 471 U.S. at 369 ("The Act contemplates that [FAPE] will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children, but the Act also provides for placement in private schools at public expense *where this is not possible*.") (emphasis added).

[4] The Board criticizes Tom F. for not visiting P.S. 871 (Br. 9, 13, 37), but the Board did not issue the P.S. 871 placement until July

(Cont'd)

III. Procedural History

A. Administrative Proceedings

An impartial hearing officer ("IHO") held a three-day hearing concerning Tom F.'s challenge to the IEP, and heard testimony from seven witnesses, including a Board educational evaluator, school psychologist, and special education teacher, Tom F., and several of Gilbert's Gaynor teachers. (J.A. 19a-32a). Applying the first prong of the *Carter/Burlington* test for evaluating tuition reimbursement claims, the IHO determined that the proposed placement at P.S. 871 was inappropriate to meet Gilbert's needs:

> Gilbert was deemed on a fourth grade level in math computation as of April, 1999, and yet the Board of Education deemed it appropriate to place Gilbert in a class where some children perform math at a kindergarten level (as measured in February 2000). The teacher sought to explain this discrepancy by indicating that the children work individually and then discuss their work in "circles," but it is not altogether clear what a higher functioning child would learn when kindergarten-level materials are being discussed in such circles. The teacher did mention that there is a child in such class with a math level akin to Gilbert's and that this child was mainstreamed into regular education (for math). However, it was not specifically indicated that Gilbert was to be mainstreamed for math. Nor was it satisfactorily explained how Gilbert could attend a fourth grade

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(Cont'd)

31, 1999, when the school was closed and there would have been nothing for a visitor to observe. More importantly, it was obvious from the face of the IEP that the proposed placement was not appropriate given, *inter alia*, the inappropriate math placement.

> level math class in a school for gifted children, where, presumably, the pace of the work would be much faster than usual and the [student/teacher] ratio would be larger than Gilbert could handle. As a result, I find the Board of Education has not offered an appropriate program and that the parent has met his burden on "prong one" [of the *Carter/Burlington* test]. (J.A. 34a-35a.)[5]

Applying the second prong of the *Carter/Burlington* test, which requires an inquiry into whether the private placement is appropriate for the child, the IHO found "more than sufficient testimony that the program at Gaynor is suiting Gilbert's needs and providing him with an appropriate education," noting significant improvement in Gilbert's word decoding, reading comprehension, math, and behavior.[6] The IHO likewise found that the equities favored reimbursement to Tom F., who "*did everything asked of him by the Board of Education in regard to this matter.*" (J.A. 35a-36a) (emphasis added). Accordingly, the IHO ordered the Board to reimburse Tom F. for Gilbert's Gaynor tuition for the 1999-2000 school year.

The Board appealed, and on March 30, 2001, a State Review Officer ("SRO") affirmed the IHO's determination that the Board had "failed to demonstrate the appropriateness

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[5] The IHO also noted that the Board had violated IDEA by failing to arrange for Gilbert's special education teacher to attend the CSE's IEP meeting. (J.A. 33a); *see also* 20 U.S.C. §1414(d)(1)(B)(iii) (requiring that IEP team include "at least one special education provider of such child").

[6] With respect to reading comprehension, for example, Gilbert had progressed from a mid-second grade level as of April 1999 to a grade level of 3.5 as of February 2000. The IHO attributed the improvement to "the thorough reading program at Gaynor, which includes an additional reading teacher and a speech and language therapist who works on [reading] skills." (J.A. 35a).

of its recommended program." The SRO further found that Gaynor was an appropriate placement, noting that the Board had "not challenged the hearing officer's finding that the educational services which Gaynor provided to respondent's son were appropriate for the student." As to equitable considerations, the SRO found that "there is no evidence in the record that respondent failed to cooperate with the CSE." The SRO also rejected the Board's argument that the tuition reimbursement remedy was unavailable because Gilbert had "not received special education services from a public agency," noting that this argument "has been considered and rejected in prior appeals."[7] (J.A. 74a-76a).

B. Court Proceedings

On July 26, 2001, the Board appealed to the U.S. District Court for the Southern District of New York, and on January 3, 2005, the court granted the Board's motion for summary judgment. The District Court did not consider the administrative tribunals' findings that the Board's proposed placement did not offer FAPE. Instead, in granting the Board summary judgment, the District Court held that the "clear implication

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[7] The SRO's case citations included *Application of a Child with a Disability*, Appeal No. 98-4 (*available at* http://www.sro.nysed.gov/1998/98-41.htm) in which an SRO noted that, ' prior to the enactment of the 1997 amendments to IDEA, it was well established that a board of education could be required to pay for the educational services obtained for a child by the child's parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations supported the parents' claim for reimbursement." After reviewing subsection (C)(ii) and its legislative history, the SRO rejected the Board's argument: "In the absence of clear evidence that Congress intended to limit the remedy of an award of tuition reimbursement to situations in which the child had previously been enrolled in a school district's special education program, I decline respondent's invitation to place such a limit upon the awarding of tuition reimbursement." *Id.* at 4.

of the plain language [of §1412(a)(10)(C)(ii)] . . . is that where a child has *not* previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from a parent's unilateral placement of the child in private school." *Board of Educ. v. Tom F.*, No. 01 Civ. 6845, 2005 WL 22866 (S.D.N.Y. Jan. 4, 2005) (A. 447) (emphasis in original).

Tom F. appealed the District Court's decision. While his appeal was pending, the Second Circuit issued *Frank G. v. Board of Educ.*, 459 F.3d 356 (2d Cir. 2006), *pet. for cert. filed*, 2006 WL 3075196 (Oct. 23, 2006) (J.A. 77a-115a) ("*Frank G.*"). As in *Tom F.*, the child in *Frank G.* had never attended public school, and the school district had provided an IEP that did not offer FAPE. *Frank G.*, 459 F.3d at 361. Nevertheless, the school district asserted that it had "an absolute legal defense" to the parents' claim for tuition reimbursement, arguing – like the Board here – that under §1412(a)(10)(C)(ii), "[o]nly after a learning disabled student enrolled in an inappropriate special education program offered by a public agency would his parents be free unilaterally to enroll him at an appropriate private school and seek reimbursement." *Id.* at 363, 365, 367.

Noting that the school district argued that §1412(a)(10)(C)(ii) should be read as "implicitly excluding reimbursement," the Second Circuit pointed out that the plain language of this provision does not exclude tuition reimbursement where a child has not previously received special education services in a public school:

> The plain language of 20 U.S.C. §1412(a)(10)(C)(ii) does not say that tuition reimbursement is *only* available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents

> whose child had not previously received special education and related services. *Frank G.*, 459 F.3d at 368 (emphasis in original).

The Second Circuit then considered whether §1412(a)(10)(C)(ii) was intended to overrule *Burlington*'s interpretation of the broad equitable remedy in 20 U.S.C. § 1415(e)(2), which authorizes a district court to "grant such relief as [it] determines is appropriate," and which this Court relied on in granting the tuition reimbursement remedy. Given that §1415(e)(2) "was unchanged by the 1997 revision to IDEA," the Court noted that "it can be presumed that Congress intended to adopt the construction given to [§1415(e)(2)] by the Supreme Court and made that construction part of the enactment." *Id.* at 369-70.

With respect to the school district's "implicit exclusion" argument, the Court noted that the preceding subsection (§1412(a)(10)(C)(i)) – which provides that a school district is not required to "pay for the cost of education . . . of a child with a disability if that agency made a free appropriate public education available to the child and the parents elected to place the child in . . . private school" – implies "that reimbursement is available where, as here, the agency failed to make a free [appropriate] public education available to the child." *Id.* at 370.

The Second Circuit then considered IDEA's "primary purpose," and whether an interpretation requiring parents to place their disabled children in inappropriate public school placements as a prerequisite for tuition reimbursement is compatible with that purpose. Noting that this Court has repeatedly instructed that IDEA "was intended to give handicapped children both an appropriate education and a free one [, and that] it should not be interpreted to defeat one or the other of those objectives," the Second Circuit ruled that "the construction of §1412(a)(10)(C)(ii) that the School

District urges upon us would defeat both purposes of the IDEA." *Id.* at 372. As for the school district's argument, also made by the Board here, that children should be required to "try out" an inappropriate public school placement, the Second Circuit "decline[d] to interpret 20 U.S.C. § 1412(a)(10)(C)(ii) to require parents to jeopardize their child's health and education in this manner in order to qualify for the right to seek tuition reimbursement." IDEA, the Court held, does not require "[s]uch a 'first bite' at failure." *Id.*

On August 9, 2006, the Second Circuit disposed of *Tom F.* by summary order, vacating and remanding for further proceedings in light of *Frank G.* On November 1, 2006, the Board filed its certiorari petition, and on February 26, 2007, this Court granted the Board's petition.

SUMMARY OF ARGUMENT

In its certiorari petition, the Board repeatedly asserted that its IEP for Gilbert offered him FAPE.[8] In its merits brief, however, the Board has abandoned that argument. Instead, the Board contends that where a school district's IEP does *not* offer FAPE, parents must nonetheless enroll their child in that inappropriate placement for some indeterminate period of time in order to qualify for tuition reimbursement.[9]

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[8] *See, e.g.*, Pet. for Writ of Cert. at 8 ("the Board made a free appropriate public education available to the student"), 4 ("§1412(a)(10)(C)(ii) unambiguously precludes tuition reimbursement *where the public agency has made a free appropriate public education available to a student*"), 19 (requesting grant of certiorari to determine whether subsection (C)(ii) requires prior public school placement "*where the public agency has made a free appropriate public education available to the child*") (emphases added).

[9] Late in its brief (Br. 36), the Board asserts that it offered Gilbert a placement in "one of the finest schools in the New York City public school system," but the Board does not explain how the administrative tribunals erred in concluding that the IEP offered to Gilbert was inadequate, or why it would have been appropriate to place a child with fourth-grade math skills in a class with students performing at a kindergarten level.

Nothing in the plain language of IDEA, in its statutory purpose, in its legislative history, in its implementing regulations, or in this Court's or lower courts' jurisprudence supports the Board's callous "give it a try" argument. Indeed, there is perhaps nothing more antithetical to IDEA's statutory purpose and this Court's jurisprudence than forcing parents to place their child in an inappropriate public school placement in order to qualify for tuition reimbursement.

The 1997 Amendments at issue – subsection (C)(ii) and the discretionary limitations on reimbursement set forth in §1412(a)(10)(C)(iii) – require no such interpretation. These provisions did not effect a change in the law. Instead, they codified existing case law concerning parents' obligations to give notice that special education is at issue, and to cooperate with school districts' attempts to provide FAPE. These provisions also provide guidance to district courts exercising their broad equitable powers under §1415(e)(2), particularly in connection with making findings as to the reasonableness of parental actions.

Contrary to the Board's argument (Br. 18), this is not a case about whether "parents who have never given the local educational agency an opportunity to provide FAPE" qualify for tuition reimbursement. *Tom F. indisputably gave the Board an opportunity to provide FAPE.* He and his son fully participated in the Board's development of an IEP, met with Board psychologists, speech and language pathologists, occupational therapists, and educational evaluators, and met with the Board's CSE. In the words of the IHO, Tom F. "did everything asked of him by the Board of Education in regard to this matter." (J.A. 35a). Having given notice to the Board that Gilbert's special education needs were at issue, and having fully cooperated with the Board's efforts to develop

an IEP and provide FAPE to Gilbert, Tom F. was not required under IDEA to "give the public school's placement a try." (Br. 22). Instead, Tom F. was authorized under IDEA, its regulations, and this Court's decisions in *Burlington* and *Carter* to place Gilbert in private school and to challenge the appropriateness of the IEP through IDEA's administrative process.

The additional hurdle that the Board seeks to impose – receipt of special education services in a public school for some unspecified period of time – is not required by IDEA or this Court's precedents, has been explicitly rejected by the U.S. Department of Education, would produce absurd results, and threatens serious harm to children with disabilities by requiring their parents to subject them to inappropriate educational placements at pain of forfeiting rights to tuition reimbursement. This is precisely the "Hobson's choice" denounced in *Burlington*, and nothing in the 1997 Amendments to IDEA or in their legislative history suggests that Congress intended to overrule *Burlington* and impose such a choice on parents.

The Board's interpretation of IDEA reflects a basic misunderstanding as to when a FAPE determination is made. Under IDEA, parents have the right to administratively challenge "any matter relating to the identification, evaluation, or educational placement of the[ir] child, or the provision of a free appropriate public education to such child." §1415(b)(6)(A). Accordingly, once an inadequate IEP has been provided, parents may seek a ruling as to whether it offers FAPE. They are not required to also "try" the public school placement. A contrary rule would render the IEP process – which this Court has described as the "*modus operandi* of the Act" and "the core of the statute," *Burlington*, 471 U.S. at 368; *Schaffer*, 126 S.Ct. at 532 – meaningless.

Finally, the Board's Spending Clause challenge – not raised below and therefore waived – is easily answered. School districts have been on clear notice at least since *Burlington* that they are potentially liable for private school tuition reimbursement if they fail to provide FAPE. Unlike *Arlington Central School District Board of Education v. Murphy*, where this Court concluded that state officials had no notice of an obligation to compensate prevailing parents for expert fees, 126 S. Ct. 2455 (2006), no state official could plausibly claim ignorance here as to whether liability for tuition reimbursement could flow from a determination that a school district's IEP did not offer FAPE.

ARGUMENT

I. The Plain Language Of §1412(a)(10)(C)(ii) Does Not Impose A Mandatory Public School "Try-Out" Period As A Prerequisite For Tuition Reimbursement

A. The Board Has No "Plain Language" Argument

The Board's argument that Congress intended that parents be forced to place their children in inappropriate public school placements in order to qualify for tuition reimbursement is premised on a 1997 amendment to IDEA codified at 20 U.S.C. §1412(a)(10)(C)(ii):

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a FAPE available to the child in a timely manner prior to that enrollment.

The Board contends that the "plain language" of this provision "creates a threshold requirement that tuition reimbursement is only available for children who have previously received special education and related services *while in the public school system*." (Br. 22) (emphasis added).[10] The Board further contends that Congress intended subsection (C)(ii) to "require[] that the parent first give the public school's placement a try," and to "limit[] the relief that may be granted pursuant to §1415(e)(2) [now §1415(i)(2)(C)(iii)]" and *Burlington*. (Br. 22, 24).

While the Board repeatedly asserts that it is making a "plain language" argument, it is actually fabricating statutory "requirements" out of whole cloth. Subsection (C)(ii) does not say that tuition reimbursement is available only to parents whose children previously received special education and related services from a public agency, nor does it say that this remedy is unavailable to parents whose child has not previously received such services. Similarly, it does not state that such services must be received "while in the public school system," nor does it mention a mandatory public school "try-out" period. Finally, subsection (C)(ii) does not state that it limits the remedies available under §1415(e)(2) and *Burlington*.

As in *Winkelman*, and as the District Court (A.447) and the Second Circuit recognized (459 F.3d at 368), the Board is actually arguing that subsection (C)(ii) "*sub silentio* or by implication bar[s] parents from seeking to vindicate the rights [previously] accorded to them" under IDEA. *Winkelman*, 127 S. Ct. at 2002. As *Winkelman* cautions, however, courts asked

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[10] *See also* Br. 21 ("the 1997 amendments expressly limit the availability of tuition reimbursement to children who received special education services *from the public school*"); Br. 33 ("the 1997 amendments expressly limit the availability of the tuition remedy to children who received special education services *at the public school*") (emphases added).

to find that IDEA provisions implicitly limit parents' rights – particularly in connection with the right "most fundamental to the Act: the provision of a free appropriate public education to a child with a disability" – must carefully consider whether such an interpretation "would be inconsistent with the statutory scheme." *Id.* at 2004, 1996. In *Winkelman*, even though IDEA did not "mandat[e] in direct and explicit terms that parents have the status of real parties in interest," this Court – after a "consideration of the entire statutory scheme" – declined "to read into the plain language of the statute an implicit rejection" of the principle that parents enjoyed such rights. *Id.* at 1996, 2003.

In arguing that subsection (C)(ii) requires parents to place their children in inappropriate public school placements even after school districts have provided IEPs that do not offer FAPE, the Board does much more violence to IDEA's statutory purpose than the school district's parental standing argument in *Winkelman*. As we explain below, subsection (C)(ii) and the discretionary limitation on reimbursement provisions in §1412(a)(10)(C)(iii) do not effect a change in the law; instead, they codify *Burlington*, *Carter*, and their progeny by clarifying the nature of the notice and cooperation obligations parents owe school districts. While these provisions provide guidance to district courts exercising their broad equitable powers under §1415(e)(2), they do not *sub silentio* exclude children who have not previously received special education services in public school or impose a mandatory public school "try-out" period.

B. Section 1412(a)(10)(C)(ii) Codifies The *Burlington* Tuition Reimbursement Remedy And Does Not Bar A Subclass Of Children From Reimbursement

1. *Burlington* Granted The Tuition Reimbursement Remedy To Parents Such As Tom F. And Prohibits An Interpretation Of IDEA That Defeats The Act's Purpose Of Providing An Appropriate And Free Education To All Children With Disabilities

In *Burlington*, this Court held that children with disabilities are not required to continue in inadequate public school placements while their parents challenge school districts' failure to provide FAPE. Instead, parents can place their children in appropriate private schools without jeopardizing their ability to qualify for tuition reimbursement. *Burlington*, 471 U.S. at 374. Declining to interpret IDEA as forcing parents into a "Hobson's choice" – "go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement" – this Court found that Congress "undoubtedly did not intend this result." *Id.* at 370. Speaking through then-Justice Rehnquist, this Court held that §1415(e)(2) (which empowers courts in actions challenging a denial of FAPE to "grant such relief as the court determines is appropriate") authorizes retroactive tuition reimbursement:

> A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course . . . it would be an empty victory to have a court tell them several years later

> that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. If that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant "appropriate" relief *Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case. Id.* at 370 (last emphasis added).

Thus, *Burlington* interpreted §1415 as authorizing courts to grant tuition reimbursement where (1) an IEP is inappropriate; (2) the private school placement is appropriate; and (3) equitable considerations favor granting relief. *Id.* at 370, 374. In reaching this result, this Court noted that IDEA "was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." *Id.* at 372.

The Board's attempt to add a fourth prong to the *Carter/Burlington* test – a public school "try-out" period – directly contradicts this Court's teaching in *Burlington* that IDEA cannot be construed in a manner that makes parents choose between an appropriate education for their child and the relief to which they may be entitled under IDEA. Nothing in subsection (C)(ii) indicates that Congress intended to reinstate this "Hobson's choice" for a certain subclass of parents and children.

2. Section 1412(a)(10)(C)(ii) Codifies The *Burlington* Remedy And Court Decisions Requiring That A Parent Provide The School District With Notice That Special Education Is At Issue And An Opportunity To Offer FAPE

The Board argues that unless subsection (C)(ii) is read to impose a mandatory public school "try-out" period, it is a "nullity" and "surplusage." (Br. 18, 21, 24-25). This is nonsense. The language of subsections (C)(ii) and (iii) reflect an obvious effort to codify the holdings of *Burlington* and its progeny, particularly as to parents' obligation to give school districts an opportunity to offer FAPE.

Subsection(C)(ii) precisely tracks *Burlington*'s facts, circumstances, and result. That case involved a student with disabilities who had "previously received special education and related services under the authority of a public agency." *See Burlington*, 471 U.S. at 361-62. Dissatisfied with an IEP, the parents enrolled their child in a private school "without the consent of or referral by the public agency." *Id.* at 362. The school district was required "to reimburse the parents for the cost of that enrollment" because it "had not made a FAPE available to the child in a timely manner prior to that enrollment." *Id.* at 363. Accordingly, the language of subsection (C)(ii) reflects not an intention to impose a mandatory public school "try-out" period, but instead to codify the holding of a landmark Supreme Court case. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994) (noting that specific provisions of a statute "were obviously drafted with 'recent decisions of the Supreme Court in mind'" because they were based on the specific factual situations present in those cases).

Subsection (C)(iii) – which gives guidance to courts on restricting reimbursement where parents have not acted reasonably in meeting their notice and cooperation

obligations – likewise codifies existing case law: "[b]efore the 1997 amendments to IDEA, several circuits had held that reimbursement for private school tuition depended on the parents cooperating with school authorities in determining the proper placement and educational plan for the child." *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 159 (1st Cir. 2004).[11] Accordingly, in listing in subsection (C)(iii) certain notice and cooperation factors that courts may consider in determining whether a parent has an equitable right to tuition reimbursement – including whether parents failed to (1) tell the school district at the IEP meeting that they were rejecting the placement and enrolling their child in private school, (2) provide written notice of this intent to the school district, (3) permit their child to be evaluated by the school district, or (4) act "[ ]reasonabl[y]" – Congress was codifying existing law. Nothing in subsection (C)(iii) indicates that Congress intended to impose a new, mandatory public school "try-out" period on parents seeking private school tuition reimbursement.

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[11] *See, e.g., Wise v. Ohio Dep't of Educ.*, 80 F.3d 177, 184 (6th Cir. 1996) (denying tuition reimbursement because parents never "made a formal complaint to [their school district] about their child's educational placement"); *Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 558 (7th Cir. 1996) (school district "cannot be forced to rely solely on an independent evaluation conducted at the parent's behest"); *Ash v. Lake Oswego Sch. Dist., No. 7J*, 980 F.2d 585, 589 (9th Cir. 1992) (denying tuition reimbursement where school district not given "a reasonable opportunity to complete the process of evaluating [the child] and making a placement recommendation"); *Evans v. Dist. No. 17*, 841 F.2d 824, 828-29 (8th Cir. 1988) (denying tuition reimbursement because parents "never made a request for a change in [their child's] placement"); *Salley v. St. Tammany Parish Sch. Bd.*, 1994 WL 148721 at *25 (E.D. La. Apr. 18, 1994) (denying reimbursement because "[t]he Board was in no position to provide a free and appropriate education to Danielle short of the full evaluation which the Salleys refused to permit"); *Fagan v. District of Columbia*, 817 F. Supp. 161, 165 (D.D.C. 1993) (reimbursement denied where parents "were primarily to blame for the failure to develop a new IEP").

Similarly, nowhere in §1412 did Congress indicate that it disapproved of, or intended to restrict, the scope of a District Court's equitable powers under §1415 or the breadth of remedies provided by *Burlington*, *Carter*, and their progeny, none of which indicates that a prior "try out" of a public school placement is necessary before tuition reimbursement can be granted. Without such express disapproval of the status quo,[12] this Court should not infer that Congress intended to effect the reversal of 20 years of judicial precedent. *See Cottage Savings Assoc. v Comm'r of Internal Revenue*, 499 U.S. 554, 561-62 (1991) (Where prior court decisions "were part of the 'contemporary legal context' in which Congress enacted" a particular statutory provision and Congress had left the principles "undisturbed" in subsequent amendments to the statute as a whole, the Court would "presume that Congress intended to codify these principles" in the statute.); *Johnson v. Manhattan Ry Co.*, 289 U.S. 479, 500 (1933) (When Congress re-enacts a piece of legislation without "any change indicative of disapproval of the prior [judicial] construction," "reenactment operates as an implied legislative approval of the prior construction".).

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[12] Both before and after the 1997 Amendments, numerous courts ruled that the reimbursement remedy was available whenever school districts had not offered FAPE, including when children had not previously attended public school. *See, e.g., Robertson County Sch. System v. King*, 1996 WL 593605 at *3, 5 (6th Cir. 1996); *Holland v. District of Columbia*, 71 F.3d 417, 418, 425 (D.C. Cir. 1995); *Gerisamou ex rel Gerisamou v. Ambach*, 636 F. Supp. 1504, 1507-08, 1511 (E.D.N.Y. 1986); *Hirsch v. McKenzie*, 1988 WL 49155, *1, *3 (D.D.C. 1988); *Shirk v. District of Columbia*, 756 F.Supp. 31, 33 (D.D.C. 1991); *Zakary M. v. Chester County Intermed. Unit*, 1995 WL 739708, *1, *5 (E.D. Pa. 1995); *see also Frank G., supra*; *M.M. v. School Board of Miami-Dade County*, 437 F.3d 1085 (11th Cir. 2006); *Justin G. ex rel. Gene R. v. Board of Educ. of Montgomery County*, 148 F. Supp. 2d 576, 587 (D. Md. 2001); *E.W. and E.W., ex rel. J.W. v. School Bd. of Miami-Dade County*, 307 F. Supp. 2d 1363, 1368 (S.D. Fla. 2004).

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When properly read together with §1415 and the Act as a whole, *see Winkelman*, 127 S. Ct. at 2000 (recognizing that a "proper interpretation" of IDEA "requires a consideration of the entire statutory scheme"), it is clear that §1412 was not intended to limit the remedies provided by §1415, but to clarify the obligations of parents and guide courts in exercising their discretion under §1415. Section 1412 requires parents to place their child's special education needs at issue and to provide a school district with a fair opportunity to attempt to provide FAPE. It does not categorically deny any parent whose child has never attended public school the opportunity to challenge an IEP and apply for tuition reimbursement.

3. Legislative History Does Not Indicate That Congress Added A Public School "Try-Out" Requirement And The Department Of Education Has Rejected This Interpretation

a. The Legislative History Does Not Support The Board's Interpretation

Legislative history concerning subsection (C)(ii) is sparse, but what does exist does not support the Board's interpretation. As the Second Circuit noted, "[t]he legislative history of the 1997 Amendments . . . is as significant for what it does not say as for what it does say." *Frank G.*, 459 F.3d at 374. In particular, there is no statement or suggestion in the legislative history that Congress intended to impose a mandatory public school "try-out" requirement.

The most pertinent legislative history merely restates the language of the statute and is consequently unhelpful. *See* H.R. Rep. No. 105-95 at 92 (1997); S. Rep. No. 105-17 at 13 (1997):

> Section 612 [20 U.S.C. §1412] also specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions

> (i.e., when a due process hearing officer or judge determines that a public agency has not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). Previously, the child must have received special education and related services under the authority of a public agency.

As the Second Circuit noted, this "awkward paraphrase" of the statutory language "does not expressly exclude reimbursement where special education and related services have not been previously provided." *Frank G.*, 459 F.3d at 373-74.

Moreover, in codifying *Burlington* and its progeny, Congressional figures emphasized school districts' obligation to provide FAPE to every child with a disability. For example, while discussing "[c]hildren enrolled by their parents in private schools," Senator Harkin emphasized that "the bill *reiterates current policy* that a public agency is not required to pay for special education and related services at a private school *if that agency made a free appropriate public education available to the child.*" 143 Cong. Rec. S4300 (daily ed. May 12, 1997) (emphasis added).

The Board and its *amici* argue that subsection (C)(ii) was designed to reduce costs to school districts, and that the "try-out" requirement was part of a cost-savings effort.[13] But nowhere in the legislative history concerning subsection

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[13] Council of the Great City Schools ("Great City"), for example, argues (at 13, 18) that a statement by Representative Castle – part of a "top 10 list of reasons to support the bill ... deliver[ed] ... David Letterman style," 143 Cong. Rec. H2536 (daily ed. May 13, 1997) – shows that subsection(C)(ii) was part of a cost-cutting effort by Congress and was designed to eliminate the tuition reimbursement remedy for

(Cont'd)

(C)(ii) does Congress state that it is imposing a public school "try-out" requirement or abrogating relief to a certain subclass of parents and children, much less that it is doing so because of a concern about the financial burden that tuition reimbursement imposes on school districts. Indeed, the 1997 Amendments *increased* school districts' responsibilities to private school students, because they mandated that the amounts spent on special education services for such students be "proportionate" to the total amount of federal funds made available to the State.[14] 20 U.S.C. §1412(a)(10)(A)(i).

(Cont'd)
certain parents. There is no evidence that Rep. Castle's remarks were directed to subsection (C)(ii), however, much less that Rep. Castle was saying that subsection (C)(ii) lowered costs to school districts by requiring parents to "try out" a public school placement. Subsection (C)(iii) provides that courts may deny or reduce reimbursement where parents have acted "unreasonabl[y]," and Rep. Castle's remark could just as easily have referred to this provision.

The Board and its *amici* frequently misrepresent the legislative history or cite it out of context. For example, Great City claims that the legislative history of subsection (C)(ii) states that this provision was enacted "to clarify the responsibility of public school districts to children with disabilities who are placed by their parents in private schools" and that "[t]hese changes should resolve a number of issues that have been the subject of an increasing amount of litigation in the last few years." *See* Great City Br. at 9; S. Rep. No. 105-17 at 13. These statements refer to §1412(a)(10)(A), however – which relates to private school students who have not requested development of an IEP. They have nothing to do with subsection (C)(ii). Similarly, the Board quotes, without citation, legislative history stating that the 1997 Amendments eliminate "inappropriate financial incentives for referring children to special education." (Br. 34). This was part of Congress' discussion of §1411, *not* §1412, and refers to the behavior of States, not parents. H.R. Rep. No. 105-95 at 90.

[14] Before the 1997 Amendments, school districts' obligations to children with disabilities enrolled in private schools was unclear. (Cont'd)

While the legislative history of the 1997 Amendments provides little guidance regarding Congress' intent in enacting subsection (C)(ii), it contains no support for the Board's mandatory public school "try-out" theory. Indeed, the absence of any mention of such a new and significant prerequisite for tuition reimbursement makes the Board's argument here completely implausible.

b. The Department of Education Has Rejected the Board's Interpretation

The U.S. Department of Education ("DOE"), the federal agency responsible for administering IDEA, has explicitly rejected the Board's arguments that (1) enrollment in a public school special education program is a prerequisite for seeking private school tuition reimbursement; and (2) subsection (C)(ii) restricts or limits a court's equitable powers under §1415. DOE's interpretation of subsection (C)(ii) was published in the Federal Register, in response to an inquiry during the notice-and-comment rulemaking period concerning implementing regulations for the 1997 Amendments, and is likewise set forth in a letter issued by DOE's Office of Special Education Programs ("OSEP") that was summarized in the Federal Register.

(Cont'd)

Compare K.R. by M.R. v. Anderson Cmty. Sch., 81 F.3d 673, 680 (7th Cir. 1996) ("Where the public school makes available necessary service at a public institution ... the public school has discharged its obligation.") *with Fowler v. Unified Sch. Dist. No. 259*, 107 F.3d 797, 807-08 (10th Cir. 1997) ("[T]he District must pay for [interpretive] service an amount up to, but not more than, the average cost to the District to provide the same service to hearing-impaired students in the public school setting.") In enacting §1412(a)(10)(A)(i), Congress imposed a consistent standard: school districts must spend a proportionate amount of their federal funding to serve children in private schools.

During the notice-and-comment rulemaking period following the 1997 Amendments, DOE was asked to clarify whether it would interpret subsection(C)(ii) as barring tuition reimbursement where a child had not previously received "special education and related services under the authority of a public agency." 64 Fed. Reg. 12,537, 12,601-02 (Mar. 12, 1999). In response, DOE stated that "hearing officers and courts retain their authority, recognized in *Burlington* and [*Carter*] to award 'appropriate' relief if a public agency has failed to provide FAPE, including reimbursement and compensatory services, under [§1415] in instances in which the child has not yet received special education and related services." *Id.* DOE explained that this authority, under §1415 and *Carter/Burlington*, "is independent of [courts'] authority under [§1412] to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency."[15] *Id.*

DOE has likewise expressly rejected an interpretation of §1412 that would impose a prior public school "enrollment" requirement on parents seeking tuition

[15] DOE's interpretation – as the "fruits of notice-and-comment rulemaking" – is entitled to deference from this Court under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See United States v. Mead Corp.*, 533 U.S. 218, 237 (2001) (Supreme Court "has recognized a variety of indicators that Congress would expect *Chevron* deference," including "an agency's power to engage in...notice-and-comment rulemaking"). Here, DOE rendered an authoritative interpretation "reflect[ing] the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997). Because DOE "focuse[d] fully and directly upon the issue," employed "full notice-and-comment procedures" to provide an interpretation on a matter falling "within the statutory grant of authority," and because the interpretation itself, as demonstrated above, "is reasonable," it is clear that Congress would have intended a court to defer to the DOE's interpretation of subsection(C)(ii). *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339, 2350-51 (2007).

reimbursement. In response to a letter asking whether the 1997 Amendments created a requirement that parents "enroll[] their child in a public program as a prerequisite [for private school tuition reimbursement]," DOE's OSEP Director stated:

> We do not view [§1412(a)(10)(C)(ii)] as foreclosing categorically an award of reimbursement in a case in which a child has not yet been enrolled in special education and related services under the authority of a public agency. Reimbursement is an equitable remedy that courts and hearing officers may order in appropriate circumstances. Letter from Thomas Hehir, Director, OSEP to Susan Lugar, C.S.W. (Mar. 19, 1999; *see also* 65 Fed. Reg. 9,178 (Feb. 23, 2000).[16]

Accordingly, the federal agency responsible for administering IDEA has flatly rejected the Board's argument that parents seeking private school tuition reimbursement must enroll their children for some period of time in a public school special education placement.

4. The Circuit Courts That Have Directly Addressed This Issue Have Rejected The Board's Interpretation

Two Circuit Courts have issued holdings as to whether subsection (C)(ii) imposes a prior public school attendance requirement. The Second Circuit (in *Frank G.)* and Eleventh Circuit (in *M.M. v. School Board of Miami-Dade County*, 437 F.3d 1085 (11th Cir. 2006)) have held that subsection (C)(ii)

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[16] The interpretation of subsection (C)(ii) reflected in the OSEP letter is at least "entitled to respect" from this Court under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (applying *Skidmore* to an opinion letter from the Department of Labor, Wage and Hour Division).

imposes no such requirement and does not restrict courts' broad equitable powers under §1415. The First Circuit, in *dicta*, has stated that "tuition reimbursement is only available for children who have previously received 'special education and related services' while in the public school (or perhaps those who at least timely requested such services while the child is in public school)," *Greenland School Dist. v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004) ("*Amy N.*"), but the First Circuit's decision turned on the issue of notice – "there was no notice at all to the school system....that special education [was] at issue," *id.* – and is thus readily distinguishable from *Tom F.*, where there was ample notice and full cooperation.

a. *Amy N.*'s Holding Relates To Notice, Not Prior Public School Attendance

While the Board claims (Br. 22) that the First Circuit has endorsed its interpretation of the "plain language" of subsection (C)(ii), the Board has misread the holding of *Amy N.* In that case, the parents "unilaterally removed" their daughter Katie from public school and placed her in private school "without ever before raising with Greenland school officials the issue of special education services for Katie." *Id.* at 152. As the First Circuit explained, "[t]he point is that there was *no notice at all* to the school system before Katie's removal from Greenland that there was any issue about whether Katie was in need of special education." *Id.* at 160 (emphasis added). The Court ruled that

> before parents place their child in private school, they must *at least give notice to the school that special education is at issue*. This serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free

> appropriate public education can be provided in the public schools. *Id.* (emphasis added).

Accordingly, the First Circuit's holding did not, as the Board argues, distinguish between children who had or had not attended public school. Instead, the First Circuit held that parents who do not notify the school district that special education is at issue are not entitled to reimbursement.

The First Circuit likewise did not endorse the Board's mandatory public school "try-out" scheme. Instead, the Court emphasized that providing notice that FAPE is at issue is required, because such notice gives the school an "*opportunity...to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided in the public schools.*" *Amy N.*, 358 F.3d at 160 (emphasis added). Tom F. gave such notice, however, and the Board was given a fair opportunity to evaluate Gilbert and propose an appropriate IEP. In short, *Amy N.*'s holding relates strictly to notice, and the one sentence of *dicta* regarding the receipt of services "while in the public school system" is both unnecessary to that decision and not illuminating here.

b. Like The Second Circuit, The Eleventh Circuit Has Ruled That There Is No Prior Public School Attendance Requirement

In *M.M. v. School Board of Miami-Dade County*, 437 F.3d 1085 (11th Cir. 2006), the Eleventh Circuit expressly rejected a school district's argument that subsection (C)(ii) imposes a prior public school attendance requirement as a prerequisite for private school tuition reimbursement. The Eleventh Circuit held that the school district's "[s]ole reliance on the fact that C.M. never attended public school is legally insufficient to deny reimbursement under §1412(a)(10)(C)(ii)" because of the broad equitable powers of courts and

hearing officers under §1415. *Id.* at 1098. According to the Eleventh Circuit, "even when a child has never enrolled in a public school, reimbursement is proper if the School Board [has] failed to offer a sufficient IEP and, in turn, a FAPE." *Id.* at 1099. An interpretation of subsection (C)(ii) that "forc[es] parents into accepting inadequate IEPs in order to preserve their right to reimbursement," the Eleventh Circuit concluded, "runs contrary to the rights recognized in the *Burlington* line of cases." *Id.* Accordingly, the Eleventh Circuit held that if parents of a disabled child request an IEP, and that IEP does not offer FAPE, the child's parents are eligible for tuition reimbursement. *Id.* at 1098-99, 1100-01.

* * * *

There is no support in IDEA, in its legislative history, in its implementing regulations, in DOE's interpretations, or in case law for the Board's argument that parents are required to "try out" an inappropriate public school IEP placement – for some unspecified period of time – in order to qualify for private school tuition reimbursement. Far from relying on the "plain language" of subsection (C)(ii), the Board has sought to engraft additional requirements for this remedy that do not exist in the statutory language.

II. Even If §1412(a)(10)(C)(ii) Requires That All Children Seeking Tuition Reimbursement Have Received "Special Education And Related Services Under The Authority Of A Public Agency," Gilbert F. Received Such Services From The Board

As demonstrated above, subsection (C)(ii) did not change two decades of preexisting law interpreting and defining the remedies available under §1415. Even if subsection (C)(ii) could be read as introducing a new requirement that a child previously have received "special education and related services under the authority of a public agency," however,

Tom F. would still be entitled to reimbursement. Children who are evaluated and assessed by school district personnel as part of the IEP process have received special education services from a public agency. [17] And, as we showed above, IDEA does not require that these services be provided *in a public school.*

A. Children Who Receive IEPs From Their School District Have Received "Special Education And Related Services Under The Authority Of A Public Agency"

This Court has characterized the identification and evaluation of children with disabilities as a *primary* purpose of IDEA. *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 200 (1982) ("Congress sought *primarily to identify and evaluate* handicapped children, and to provide them with access to a free public education.") (emphasis added). To accomplish this purpose, Congress created the IEP process, which it "envision[ed] ... as the *centerpiece of the statute's education delivery system* for disabled children." *Honig v. Doe*, 484 U.S. 305, 311 (1988)

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[17] The Board's *amici* are flatly incorrect in citing §1412(a)(10)(A) for the proposition that children in private schools have no right to FAPE and no right to access the IEP process that leads to the FAPE determination. *See* U.S. Conf. of Mayors Br. at 11-12, 15; New York State School Boards Ass'n Br. at 14-15; Nat'l School Boards Ass'n Br. at 15-16. FAPE is a right that *all* children with disabilities enjoy under IDEA. *See* 20 U.S.C. §1412(a)(1)(A) (requiring States to ensure that "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21"). Section 1412(a)(10)(A) has no bearing on this case; children who fall under subsection (A) remain in private schools without ever requesting an IEP. In order to begin the IEP process and invoke the full protections of the Act, parents of a child with a disability need only request an evaluation, as did Tom F. *See Winkelman*, 127 S.Ct. at 2000 ("IDEA requires school districts to develop an IEP for each child with a disability.").

(emphasis added). Indeed, the "*modus operandi* of the Act" and "the core of the statute," is the "individualized educational program." *Burlington*, 471 U.S. at 368; *Schaffer*, 126 S. Ct. at 532. Accordingly, the development of an IEP – the "educational delivery system" for children with disabilities – is inextricably linked with special education instruction, and constitutes "special education and related services" under IDEA.

The phrase "special education and related services" is used throughout IDEA to designate the full panoply of services a child with a disability may be entitled to receive. For example, the Act defines a "child with a disability" as one who "by reason of" certain defined disabilities "needs *special education and related services*." 20 U.S.C. §1401(3)(a)(ii). The Congressional Findings appended to the statute also use the phrase, noting that the education of children with disabilities can be "made more effective" by "providing appropriate *special education and related services* . . . to such children." 20 U.S.C. §1400(c)(5)(D). IDEA also states that its purpose is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes *special education and related services* designed to meet their unique needs." 20 U.S.C. §1400(d)(1)(A).[18] In sum, Congress uses the phrase "special

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[18] The Act uses the same phrase in describing an "educational services agency," *see* 20 U.S.C. §1401(5)(A)(ii); and "free appropriate public education," *id.* at (9); in defining grants to states, *see* 20 U.S.C. §1411(a) ("The Secretary shall make grants to States . . . to assist them to provide *special education and related services* to children with disabilities."); in clarifying states' obligations under "child find," 20 U.S.C. §1412(a)(3)(A)-(B), *id.* at (a)(10)(A)(i), (iii) and (iv); in describing qualifications for special education teachers, 20 U.S.C. §1412(a)(14); in describing the obligations of a local educational agency in order to be entitled to funding, 20 U.S.C. §1413(a)(2) and (4), (f)(4); in outlining evaluation processes, 20 U.S.C. §1414(a)(1)(A), and in many other provisions.

education and related services" as "statutory shorthand" to describe the panoply of benefits available to children with disabilities.

Within the panoply of benefits available to children with disabilities are the evaluative, testing, observation, and educational planning services that make up the IEP, which in turn provides the blueprint for the special education instruction the child will receive. Indeed, IDEA defines "related services" as:

> . . . such developmental, corrective, and *other supportive services* (including speech-language pathology and audiology services, interpreting services, [and] psychological services . . . as may be required to assist a child with a disability to benefit from special education, *and includes the early identification and assessment of disabling conditions in children.* 20 U.S.C. §1401(26) (emphasis added).

IDEA's implementing regulations likewise broadly define "related services" to include "such developmental, corrective, and *other supportive services as are required to assist a child with a disability to benefit from special education.*" 34 C.F.R. § 300.24 also lists several illustrative examples of "related services," including: "early identification and assessment of disabilities in children," "medical services for diagnostic or evaluation purposes," and "psychological services," which is interpreted to include "administering psychological and educational tests, and other assessment procedures" and "interpreting assessment results." Accordingly, IDEA and its implementing regulations define "related services" as including the tests, evaluations, assessments, observations, meetings, review and interpretation of testing, and other services that are necessary to the creation of an IEP.

With the full cooperation and participation of Tom F., the Board provided extensive testing and evaluative services to Gilbert F. in connection with formulating three separate IEPs for Gilbert for the 1997-98, 1998-99 and 1999-2000 school years. During these years, Gilbert was repeatedly examined and observed by Board speech/language pathologists, psychologists, and occupational therapists. He received a full battery of evaluative tests from these professionals aimed at determining his disability and developing an appropriate educational plan. For example, in preparation for the IEP issued by the Board for the 1999-2000 school year – the IEP that immediately preceded this litigation – the Board arranged for: (1) a Board school psychologist to observe Gilbert in his Gaynor reading class; (2) a Board educational evaluator to test Gilbert's competence in reading comprehension, reading decoding, spelling, and math computation; (3) a Board school psychologist to evaluate Gilbert and test his IQ; (4) a Board occupational therapist to assess Gilbert, his gross and fine motor skills, and visual perception; and (5) Board speech/language pathologists to evaluate Gilbert's oral peripheral speech mechanism, the rate and rhythm of his voice, his hearing, his articulation, and his use of language. (J.A. 68a-69a; A. 174-189, 199).

All of this testing, observation and evaluation was in preparation for the Board's CSE meeting at which an IEP for the 1999-2000 school year was developed. These extensive tests and evaluations and the creation of three separate IEPs constitute services related to, and intended to serve and address, Gilbert's educational needs, and therefore are "special education and related services [received] under the authority of a public agency."

B. In Reimbursing Gilbert's Gaynor Tuition For the 1997-98 and 1998-99 School Years, the Board Provided Gilbert With "Special Education and Related Services"

In September 1998 and July 1999, the Board signed settlement agreements with Tom F. in which it acknowledged that Gilbert was "properly classified as learning disabled" and agreed to pay the costs of the special education and related services that Gilbert received at Gaynor. (A. 7, 14). In reimbursing Gilbert's Gaynor tuition for 1997 and 1998, the Board provided Gilbert with "special education and related services under the authority of a public agency."[19] Moreover, the Board remained intimately involved in Gilbert's education while he was enrolled at Gaynor.

The Board's exercise of "authority" over Gilbert's education at Gaynor is evidenced by the language of the settlement agreements. The agreements provided for the Board to remain enmeshed in Gilbert's educational progress, and to provide evaluative and assessment services to Gilbert while he was enrolled at Gaynor. For example, they required Gilbert's parents to "work cooperatively with the CSE" to secure the presence of Gaynor staff at meetings of the CSE. They also required Tom F., during the time Gilbert remained enrolled at Gaynor, to make Gilbert available to the Board for observation, and to make available all records, reports, evaluations, and testing results concerning Gilbert's progress at Gaynor. Finally, the Agreements required Tom F. to consent

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[19] Special education and related services can be provided in a private school, of course, even under a unilateral placement. *See, e.g., Burlington*, 471 U.S. at 359 ("[T]he Act also provides for placement in private schools at public expense."); *P.N. v. Seattle Sch. Dist. No. 1*, 474 F.3d 1165, 1173 (9th Cir. 2007) (noting that parent had "secured some special education benefits for her child" pursuant to settlement agreement in which school district agreed to pay private school tuition for a unilaterally-placed child).

in advance to a new, Board-conducted evaluation at the end of the school year, "for the purposes of recommending a free appropriate public education" for the following year. (A. 7-8).

* * * *

The statutory criteria for tuition reimbursement do not distinguish between a child who has previously received special education and related services in a public school and a child who has received the same services in a different setting. In both instances, the threshold requirements and equitable considerations – primarily adequate notice and parental cooperation – are the same. Where a parent who "has done everything asked of him" by the school district is nonetheless denied FAPE for his child, the lesson of *Burlington* and its progeny is that tuition reimbursement should not be denied.

III. Reading 20 U.S.C. §1412(a)(10)(C)(ii) to Prevent Tuition Reimbursement Where a School District Has Not Provided FAPE Violates IDEA's Primary Purpose

A. The Board's Argument That It May Deny FAPE and Also Deny Private School Tuition Reimbursement is Incompatible With IDEA and This Court's Jurisprudence

Nothing is more central to IDEA than its assurance that all children with disabilities have access to a free and appropriate education. A State receiving funds under IDEA must provide assurance to the federal government that FAPE is available to every resident child with disabilities. *See* 20 U.S.C. §1412(a)(1)(A). Congress enacted this requirement in light of its finding that "improving educational results for children with disabilities is an essential element of our national policy." *See* 20 U.S.C. §1400(c)(1). And this

Court has repeatedly held that any interpretation of IDEA that compromises FAPE cannot be countenanced: "The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of these objectives." *Burlington*, 471 U.S. at 372; *see also Carter*, 510 U.S. at 365 (rejecting interpretation of IDEA that "would defeat this statutory purpose"). The Board's argument that FAPE may be denied to certain children – those who have not previously received "special education and related services" in public school – is utterly antithetical to this core principle.

The risk that children will be denied FAPE without recourse – if the Board's interpretation is adopted – is not merely theoretical. Here, there is no question that Gilbert F. was denied FAPE. The IHO specifically found that the "Board of Education has not offered an appropriate program," and on appeal, the SRO affirmed that decision. (J.A. 34a-36a, 74a-76a). Accordingly, this case squarely poses the question of whether a school district that has failed to offer FAPE may nonetheless force a child into an inappropriate placement, at pain of sacrificing future tuition reimbursement. Such a result would render the IEP process largely meaningless, because even where a school district offers an IEP that does not provide FAPE, parents would nonetheless be required to "give it a try." Such a result "would [likewise] defeat [IDEA's] statutory purpose" of ensuring that every child with a disability receives an appropriate education.

B. Adoption Of The Board's Interpretation Would Lead To Absurd Results, Nullify The Protections IDEA Offers To Children With Disabilities, And Cause Uncertainty And Hardship For School Districts, Parents, And Children

Adoption of the Board's interpretation of subsection (C)(ii) would leave many children who have been denied FAPE with no effective remedy, including children in both public and private schools who – in the Board's view – have not "previously received special education and related services under the authority of a public agency." Such children would include (1) public school students whose disabilities were only recently diagnosed but whose proposed IEP for the following school year does not provide FAPE; (2) public school students who were promised certain services under an IEP but who have not timely received those services; and (3) children entering public school for the first time who were not identified through IDEA's "child find" provision.[20] Many private school students such as Gilbert F. will likewise be left with no remedy, including, for example, children with disabilities who have never been enrolled in public school but whose family can no longer afford the cost of private school tuition.

The Board's interpretation of subsection (C)(ii) would deny the tuition reimbursement remedy to all of these children's parents even if they gave notice to the school

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[20] The claim by the U.S. Conference of Mayors et al. (at 21) that no such children exist, because all disabled preschoolers receive special preschool education under §1419 of IDEA and thus will have "previously received special education," is unduly optimistic. It is precisely those preschool-age children who have been overlooked or late-diagnosed who might require the opportunity to receive appropriate education at an alternative setting once they reach school age. Yet, according to the Board's interpretation of IDEA, it is precisely those children who have no right to that remedy.

district that special education was at issue and cooperated in good faith with the school district's development of an IEP. The Board's blithe dismissal of the children who will fall through the cracks as "rare" and unavoidable victims of the Board's statutory construct is unacceptable. FAPE is not an aspiration, but a requirement. IDEA mandates that *all* children with disabilities – not just some – receive FAPE and the other protections of the Act. The Board's interpretation cannot be reconciled with this statutory purpose.

The Board's assurance that children like Gilbert F., and those described in the examples above, will still be protected by other aspects of IDEA – notwithstanding the inability to obtain private school tuition reimbursement – is illusory. When a school district has demonstrated that it is incapable or unwilling to provide FAPE to a student, resort to an appropriate private school and relief in the form of tuition reimbursement may be the only viable option. Further "collaboration" between the parents and the school board, recommended by the Board's *amici* (Nat'l School Boards Ass'n Br. 17-28; U.S. Conf. of Mayors Br. 4, 7), makes little sense where a parent has determined that a child needs a particular accommodation that the school district is not offering. Here, for example, further "collaboration" would not have remedied the Board's failure to provide FAPE to Gilbert. His father concluded (and an IHO agreed) that Gilbert needed a math class consistent with his abilities and with an appropriate teacher-student ratio, which the Board's placement could not provide. And the "second chance" to provide FAPE that the Board is truly seeking here constitutes, as the Second Circuit noted, the child's "first bite at failure." *Frank G.*, 459 F.3d at 372.

Finally, the "try-out" period that the Board attempts to graft onto subsection (C)(ii) – aside from having no textual support – creates more problems than it solves, and could not have been what Congress intended. First, the Board has no explanation, and no statutory answer, for how long the

"try-out" period should last. As a result, school districts and parents will inevitably battle over the length of time that a disabled child must remain in an inappropriate public school placement before the statute is satisfied. The indeterminate length of the allegedly mandatory "try-out" period highlights the incongruity of the Board's interpretation; forcing children to make a ceremonial appearance in public school in order to qualify for tuition reimbursement accomplishes nothing.

Second, whether the "try-out" period lasts a day or a year, the burden of the inappropriate placement will fall squarely on the child's shoulders. As one court stated: "[c]hildren are not static beings; neither their academic progress nor their disabilities wait for the resolution of conflicts." *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 760 (3d Cir. 1995). Even a short period in an inappropriate educational setting can have profoundly negative consequences for a child's development, particular for children with more severe disabilities, as the *amici* briefs filed in support of this brief vividly demonstrate.

The Board's interpretation of the statute likewise cannot be reconciled with the reality of modern education. Parents need to know where their children will be attending school in the upcoming school year; they cannot drop in or out of schools on a whim. Private schools, especially those in urban areas, often have long waiting lists and demand down payments well in advance. Requiring a public school "try-out" period will force parents to enroll their child at the beginning of the school term in a public school, and then require them to attempt a transfer to a private school once the mandatory try-out period – however long it might be – is over. At the very least, this will mean serious disruption in the child's education. At worst, the child could lose his or her place at the private school altogether, and have no choice but to remain for the entire year in the inappropriate public school placement.

C. Adequate Safeguards Exist Against "Gaming The System," And The Board Has No Valid Cost Reduction Argument

IDEA and the case law interpreting it have imposed strong safeguards against parents who might seek to "game the system." As this Court has stated, "[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, *and* the burden of demonstrating all three requirements for relief. *Burlington*, 471 U.S. at 373-74; *Schaffer*, 126 S. Ct. at 537. This statutory construct is a significant deterrent to false or speculative claims. *See Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2011 (2007) (Scalia, J., dissenting) ("actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate").

The current IDEA framework also addresses the Board's and *amici*'s concerns that parents may seek an IEP and later challenge its adequacy, even though they have no intention of placing their child in public school.[21] To the extent that a

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[21] Contrary to the Board's and *amici*'s claims (Br. 36; Great City Br. 25), there is no evidence that any gaming of the system occurred here. Tom F. did not testify that he had "predetermined . . . to reject the public placement" – as the Board argues without citation. (Br. 36). Moreover, both the IHO and SRO found that Tom F. had fully cooperated with the Board and done "everything asked of him." (J.A. 35a). Gilbert and Tom F. cooperated with a full battery of intensive testing and assessments in connection with three separate IEPs, and Tom F. attended all required meetings with the CSE. While the Board and *amici* (Br. 9, 13; Great City Br. 25) criticize Tom F. for his failure to visit P.S. 871 in July – when the Board issued the

(Cont'd)

parent's claim for tuition reimbursement lacks good faith, courts are fully authorized to consider this factor. Tuition reimbursement is an equitable remedy, and "equitable considerations [including those in subsection (C)(iii)] are relevant in fashioning relief." *Burlington*, 471 U.S. at 374; *Carter*, 510 U.S. at 16. Indeed, courts have rejected tuition reimbursement claims from parents who appear to be gaming the system. *See, e.g., Carmel Central Sch. Dist. v. V.P. ex rel G.P.*, 373 F. Supp. 2d 402 (S.D.N.Y. 2005) (rejecting claim for tuition reimbursement where parents "never had the slightest intention of allowing the child to be educated in the public school [and] did everything possible to frustrate a timely review of [her] condition").

Finally, there is no evidence that States are being overwhelmed by tuition reimbursement claims, nor is there any evidence that rejecting the Board's interpretation of subsection (C)(ii) will have an "enormous economic impact," as the Board alleges. (Br. 41). According to 2004 data from the U.S. Department of Education, only 1.5% of all children with disabilities are educated in private school at public expense. This number has remained essentially unchanged over the past fifteen years. *See Debunking A Special Education Myth*, Greene, J.P. and Winters, M.A., in EDUCATION NEXT, No. 2 at 68 (2007). And most of these children were placed in private school by a public authority, and not unilaterally by their parents. *Id.* Furthermore, data from 2000 shows that the money spent by public schools for private placements of disabled children amounted to only 0.24% of their entire budget of $382 billion. *See* Greene and Winters at 70.

(Cont'd)

placement and when the school was closed for the summer – there would have been nothing to observe at that time. If the Board had offered a placement that Tom F. could have observed, he testified that he would have done so. (A. 237). Most importantly, the IEP provided by the Board was inappropriate on its face.

Moreover, the Board and its *amici* have vastly overstated the cost difference between educating a particular child with disabilities in private school as opposed to public school. Council of the Great City Schools asserts that public schools on average spend five times as much on students receiving special education in private schools as they do on students receiving special education in public schools. *See* Great City Br. 20. But this is an "apples and oranges" comparison; it ignores the fact that children with severe disabilities are disproportionately placed in private schools *by school districts* because they require more services, and therefore more funding. *See* Greene and Winters at 69. Furthermore, as to children with less serious disabilities, it is far from clear that school districts will save money by educating such children in public school instead of reimbursing private school tuition. In 1999-2000, for example, New York City expended an average of $26,497 per child for special education at public schools. *See* New York City Department of Education Office of Financial and Management Reporting, School-Based Expenditure Reports, School Year 1999-2000.[22] Gilbert F.'s private school tuition for that year was $21,819 – $4,678 ***less*** than what it would have cost the average New York City public school to educate him.

In sum, the Board has not established that Congress' intent in enacting subsection (C)(ii) had anything to do with cost; it has not established that a public school education costs less for a child suffering from Gilbert's disabilities; and it has not explained how requiring children with disabilities to attend public school for a week or some other indeterminate time period will reduce its costs. Finally, this Court dispositively answered the Board's cost argument fourteen years ago:

> There is no doubt that Congress has imposed a significant financial burden on States and school

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[22] Available at http://www.nycenet.edu/offices/d_chanc_oper/budget/exp01/y1999_2000/FY2000T1.asp.

> districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. *This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.* *Carter*, 510 U.S. at 15 (emphasis added).

IV. States Are On Clear Notice That If They Do Not Provide FAPE, They Are Potentially Liable For Private School Tuition Reimbursement

The Board claims that it was not on notice that it might have "an obligation to reimburse parents who unilaterally place their children in private school when those children have never previously received special education and related services from the local educational agency." (Br. 40-41). Accordingly, the Board argues, under the Spending Clause and this Court's decision in *Arlington Cent. School Dist. Board of Educ. v. Murphy*, 126 S. Ct. 2455 (2006), the tuition reimbursement remedy is not available to parents of such children. The Board cannot prevail on this argument for several reasons.

First, the Board did not raise this argument below, and thus has waived it. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 506 U.S. 153, 162 n.12 (1993). Second, the Board ignores the fact that school districts have been on notice since *Burlington* that they are potentially liable for private school tuition reimbursement if they do not provide FAPE, and nothing in §1412(a)(10)(C)(ii) alters this core principle of IDEA. Finally, the Board has not explained how

Respondent's interpretation of subsection (C)(ii) imposes a greater burden on the States, or conversely how the Board's interpretation will lead to less of a financial burden.

A. The States Have Been On Notice At Least Since *Burlington* That They Are Potentially Liable For Tuition Reimbursement Where They Have Not Provided FAPE

In *Burlington*, this Court held that courts reviewing challenges to IEPs have broad discretion, under §1415, to "grant such relief as the court determines is appropriate," and that "Congress meant to include retroactive reimbursement to parents as an available remedy" where FAPE has not been provided. *Burlington*, 417 U.S. at 370. The States have thus been on notice since *Burlington* that they could be liable for reimbursement of private school tuition *if they did not provide FAPE* to children with disabilities whose parents request development of an IEP.[23]

The Board pretends that none of this history exists, and does not even cite *Burlington* in its Spending Clause argument. Instead, it reads §1412(a)(10)(C)(ii) in a vacuum, suggesting that its addition to the Act in 1997 was entirely without context and rendered the statute "ambiguous" as to the tuition reimbursement right. (Br. 40-41). As we showed

[23] States looking to discern potential liabilities under a Spending Clause statute must consider how that statute has been authoritatively interpreted by this Court. *See, e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182 (2005) ("Funding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979, when we decided *Cannon*."); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643 (1999) (finding that Supreme Court precedent, the regulatory scheme surrounding Title IX, and the common law all put schools on notice that they could be held responsible for failure to respond to student-on-student sexual harassment). Thus, any discussion of whether states were "on notice" of their obligations under IDEA must include *Burlington*.

in Point I above, the Board has not demonstrated that subsection (C)(ii) was intended to restrict §1415 or otherwise overrule *Burlington*. Rather, the 1997 Amendments codified *Burlington* and 20 years of subsequent jurisprudence in which parents' notice and cooperation obligations were delineated. Given that there is no indication in subsection (C)(ii), in its legislative history, or in DOE's implementing regulations that this provision was intended to limit the tuition reimbursement remedy to children who had attended public school, no state official would have been justified in making that assumption.[24] Stated another way, after the 1997 Amendments, State officials remained on notice that States could be liable for tuition reimbursement where an IEP did not offer FAPE, a private school placement was appropriate, and the equities favored the parent.

Arlington requires no different result. In that case, this Court considered whether IDEA – which explicitly grants courts the discretion to "award attorneys' fees as part of the costs" to prevailing parties – also authorized an award of expert fees. Noting that the statute said nothing about expert fees and that "'costs' is a term of art that generally does not include expert fees," this Court declined to impose this obligation on the States. *Arlington*, 126 S.Ct. at 2459-61. Nothing in *Arlington* supports the Board's Spending Clause argument here, however.

First, the Board ignores *Burlington*'s holding that §1415 gives courts broad discretion to grant the tuition reimbursement remedy, and that there is no evidence that subsection (C)(ii) was intended to abrogate that holding. Second, unlike the expert fees dispute in *Arlington*, the issue here relates to the mandate "most fundamental to the Act: the provision of a free appropriate public education to a child with a disability." *Winkelman*, 127 S. Ct. at 2004. In arguing

[24] Indeed, New York officials drew the opposite conclusion.

that parents must place their children in an inappropriate public school placement in order to qualify for tuition reimbursement, the Board is striking at and undermining the "core purpose" of IDEA: the guarantee of an appropriate education for all children with disabilities.

At least since *Burlington*, States have known that when they do not provide FAPE, they can be liable for private school tuition reimbursement. There is nothing new about this obligation. "The basic measure of monetary recovery [remains the same]," and Respondent's interpretation of the Act does "not impose any substantive condition or obligation on States [that] they would not otherwise be required by law to observe." *Winkelman*, 127 S. Ct. at 1997. States were also well aware of this Court's jurisprudence rejecting attempts to interpret IDEA in a manner that would deny either a free or an appropriate education to children with disabilities. *Burlington*, 471 U.S. at 372 (IDEA "should not be interpreted to defeat one or the other of those objectives"); *see also Carter*, 510 U.S. at 365. Because States have always had clear notice of their potential liability where they did not offer FAPE, there is no notice issue and therefore no Spending Clause issue for this Court to address.

B. There Is No New Financial Obligation To Consider Under The Spending Clause

The Board's Spending Clause argument also fails because the Board cannot establish that Respondent's interpretation of the statute imposes a greater financial burden on school districts. The Board never explains how its alternative statutory interpretation of subsection (C)(ii) would actually save public schools money. Without such proof, "[t]he basic measure of monetary recovery [has] not [been] expanded," and there is no Spending Clause issue to consider. *Winkelman*, 127 S. Ct. at 1997.

The mandatory public school "try-out" period that the Board reads into the statute will not insure that tuition reimbursement claims will decline, or that school districts will save money. *See supra* page 43. Accepting the Board's interpretation will not prevent parents from placing their child in private school and seeking reimbursement; it will merely delay that remedy for the length of the "try out," which could be as short as a day.

Similarly, there is no reason to believe that imposition of the "try-out" period will have the intended practical effect of decreasing tuition reimbursement claims. Every tuition reimbursement claim arises in a context in which parents have already decided that the IEP for their child does not offer FAPE. The Board's suggestion that the deficiencies of the placement will somehow cure themselves during the "try-out" period is dubious and unsupported. Moreover, if the school district had the means and desire to improve its educational offering and address the parents' concerns, that surely would have emerged during the IEP process. Any "try-out" is likely to be unsuccessful and brief.

Ironically, the Board's interpretation of subsection (C)(ii) would likely impose a *greater* financial burden on public schools. School districts must allocate resources – *e.g.*, physical space, teacher salaries, books and supplies, school lunches, athletic and social programs – for every child educated within the system. If all children with disabilities must "try out" public school placements, school districts will have to allocate classroom resources for the education of these children, even where it is likely that they will not remain enrolled in public school. By forcing such children to endure the inappropriate public school placement for a day, a week, or a month, the school district wastes the resources allocated to these children if they subsequently transfer to a private school.

Even accepting the dubious proposition that public schools can always service children with disabilities at less cost than private schools, the Board's interpretation of subsection (C)(ii) does not promise true cost savings to school districts, and thus the Board has no Spending Clause argument. The mandatory public school "try-out" period advocated by the Board will cause public schools as well as parents and children to suffer enormous disruption and needless expense, all to no end. School districts will remain liable for private school tuition reimbursement where their IEPs do not offer FAPE and private school placements are appropriate.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F. on behalf of GILBERT F., a minor child,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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The language of 20 U.S.C. § 1412(a)(10)(C)(ii) is clear and establishes that parents may request private school tuition reimbursement under the IDEA only where their child has "previously received special education and related services under the authority of a public agency." One purpose of this provision, as with many provisions of the IDEA, is to promote cooperation between parents and school districts in the education of students with disabilities. Congress intended that parents and school districts work together to resolve disagreements about the services being provided to children with disabilities, and subsection (C)(ii) states clearly one of the ways that Congress effectuated that intention.

Respondent and his *amici* attempt to avoid the plain language of the statute by misrepresenting the purpose and structure of the IDEA, as well as this Court's decision in *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985). *Burlington* established that a remedy of private school tuition reimbursement was available under the IDEA's predecessor statute, but it did not address the issue presented in this case, *i.e.*, whether hearing officers and courts may order such reimbursement where the child has never received special education and related services from the public agency. With the 1997 amendments, Congress answered that question, and respondent's strained attempts to avoid what the statute says are unavailing.

Finally, even if respondent were correct that the statute does not prevent parents from seeking reimbursement where the child has not previously received special education and related services from the public entity, the statute certainly does not provide clear notice that states are obligated to provide such reimbursement in cases where the student has not previously received such services from the public agency. Spending Clause legislation like the IDEA must provide clear notice of the obligations it imposes, and without that notice, such obligations cannot be enforced against the States.

POINT I

THE LANGUAGE OF SECTION 1412(a)(10)(C)(ii) OF THE IDEA IS CLEAR AND CREATES A STATUTORY THRESHOLD TO TUITION REIMBURSEMENT

The language chosen by Congress means what it says:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school, without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii). The plain meaning of this language is that courts and hearing officers may order reimbursement of private school tuition only if the student "previously received special education and related services" from the school district. It creates a threshold requirement that must exist before parents may ask a hearing officer or a court to order reimbursement for private school tuition pursuant to the IDEA. This interpretation is a straightforward reading of the statutory language, and it should be adopted by this Court.

This interpretation also flows naturally from a reading of the statutory section of which this clause is part. The provision at issue—clause (ii) of subsection (C)—is part of a subsection entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency." 20 U.S.C. § 1412(a)(10)(C). Subsection (C)(ii) sets forth the authority of hearing officers or courts to order tuition reimbursement, and it says that they may do so where the child has previously received special education and related services

from the school district. The statute then sets forth factors hearing officers and courts should consider in determining whether "the reimbursement described in clause (ii)" should be reduced or denied. 20 U.S.C. § 1412(a)(10)(C)(iii). For example, as will be discussed in greater detail, *infra*, a parent is required to give ten business days notice to the public agency prior to removing the child from the public school. Thus, the statute makes quite plain that the reimbursement hearing officers or courts may order is the reimbursement specified in subsection (C)(ii), and the language of subsection (C)(ii) states plainly that that reimbursement is available for students "who previously received special education and related services" from the school district.

The language in subsection (C)(ii), therefore, establishes a condition precedent to a parent's request for tuition reimbursement. The language of the statute means that parents who unilaterally place their child in a private school may not request tuition reimbursement—and a hearing officer or court cannot consider granting tuition reimbursement—unless the child has previously received special education and related services under the authority of a public agency. Petitioner respectfully submits that the "previously received" language is clear and that it creates a statutory threshold to tuition reimbursement.

POINT II

SUBSECTION (C)(ii) IS CONSISTENT WITH THE IDEA'S EMPHASIS ON COOPERATION BETWEEN PARENTS AND SCHOOL OFFICIALS

A straightforward reading of the statutory language is also consistent with the purpose and structure of the IDEA. Congress intended to promote cooperation between the parent and the school district, and it intended that if a parent genuinely wants to avail the child of a free appropriate public education, the public school must be afforded the opportunity to work with

the parent. Subsection (C)(ii) demonstrates Congress's intent that the parent cooperate with the school district in a meaningful way, as well as Congress's recognition that the only way to foster cooperation is for the student to participate, even if for only a short while, in the public education process.

In trying to circumvent the plain language of the statute, respondent is forced to misconstrue the purpose of the IDEA. Respondent seems to be of the view, as the Solicitor General asserts, that "the Act requires States to provide [FAPE]" to "all children residing in the State," subject to just two enumerated exceptions not at issue here. Brief for the United States as Amicus Curiae Supporting Respondent at pp. 1-2, 7, 20. Respondent and his *amici* then claim, incorrectly, that the consequence of following the statutory language would be to leave parents of students who have not previously received special education and related services from the school district with no remedy if the school district's IEP does not provide FAPE. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondent at p. 20.[1]

The purpose of the IDEA is to provide children with disabilities with access to a free appropriate public education. 20 U.S.C. § 1400(c)(3). The IDEA, however, does not require states to provide a FAPE to every child. Where parents voluntarily place a child in private school, they are not entitled

1. In support of this argument, the Solicitor General misconstrues the purpose of the "child find" requirement contained in 20 U.S.C. § 1412(a)(3) and (a)(10)(A)(ii). The Solicitor General contends that the child find requirement is meant "to ensure that the State *makes available* to [all disabled children] a free appropriate public education" (emphasis in original). Brief for the United States as Amicus Curiae Supporting Respondent at p. 22. As § 1412(a)(10)(A)(ii)(II) makes clear, however, in regard to children voluntarily placed in private schools by their parents, the child find requirement is meant "to ensure equitable participation of parentally placed private school children with disabilities. . . ." Under the IDEA, States need not provide parentally placed private school children with a FAPE. *See* 20 U.S.C. § 1412(a)(10)(A).

to a FAPE at public expense. Instead, the IDEA requires a state to provide only certain defined services, and then only the amount of those services that can be paid for with each child's proportionate share of funds under the IDEA. 20 U.S.C. § 1412(a)(10)(A).

Thus, the IDEA creates a distinction between students in private schools and students who are in public school or receive services under the authority of a public agency. Consistent with that distinction—and with the different obligations a state has in regard to children in those distinct situations—the IDEA places limits on the ability of parents to request private school tuition reimbursement, even where a court or hearing officer finds that the school district did not offer a student a FAPE. For instance, under 20 U.S.C. § 1412(a)(10)(C)(iii), tuition reimbursement may be reduced or denied if at the most recent IEP meeting that the parents attended "prior to removal of the child from the public school," the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense[2]; or if within "10 business days . . . prior to the removal of the child from the public school," the parents did not give written notice to the public agency.[3]

These limitations presume that the child was receiving services from the public school and that the child is being removed from the public school placement to be placed unilaterally in private school. Seen in the context of the statute, then, the "previously received" language makes perfect sense. It means that parents may request tuition reimbursement only for those students who have received special education and related services under the authority of the public agency. This

2. 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa).

3. 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb).

limitation, like the factors contained in § 1412(a)(10)(C)(iii), is meant to foster cooperation between parents and school districts.

Respondent's interpretation of the statute, on the other hand, is inconsistent with the IDEA's structure and would undermine the cooperation the IDEA is intended to foster. If, as respondent contends, students need not ever have received special education and related services from the public entity before requesting private school tuition reimbursement, then not only is the "previously received" language rendered meaningless, but the ten day notice requirement is rendered entirely ineffective, since there can be no notice "prior to removal of the child from the public school" if the child never received any services from the public school.

Indeed, respondent's interpretation would create a perverse incentive for parents to avoid ever trying to work out an appropriate placement with the school district. Under respondent's interpretation, parents whose child participates in the public placement would be required to provide written notice of their intent to reject it ten days prior to removing the child from the public placement. If, however, the student never participated in the public placement, then the parents would not have to provide such notice. Thus, respondent's interpretation would make it less likely that parents would cooperate with school districts. This result would run counter to Congress's intent to foster more, rather than less, cooperation between parents and school districts.[4]

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4. In fact, one result of respondent's argument would be that parents who place their children in private school without cooperating with the public school would have an advantage in getting tuition reimbursement over parents who cooperate with the public school, because the limiting factors of 20 U.S.C. § 1412(a)(10)(c)(iii) would not be applicable to a tuition reimbursement claim if the student has not previously received special education and related services from the public agency.

(Cont'd)

Respondent's argument also relies upon the faulty premise that the IEP, once developed, is a static document that cannot be changed. Respondent seems to be arguing that if an IEP is not adequate, a parent's only remedy is to remove a child unilaterally to private school and seek tuition reimbursement. Respondent is incorrect. The ten day notice requirement, for instance, makes parents identify their complaints about the IEP and gives the school district the opportunity to address those complaints. Thus, cooperative resolution of a parent's complaints is one possible remedy. Impartial hearings are another. If an IEP does not provide a FAPE, parents may seek an impartial hearing for the purpose of obtaining an order for the school district to provide the services the student requires. 20 U.S.C. § 1415(f). If such an order is obtained, the school district must provide the ordered services.[5]

Respondent and his *amici* thus misconstrue the IDEA and its requirements in order to try to support their strained interpretation of the statute's words. There is a reason they must do so: the language of the statute is plain, and it is an integral piece of the IDEA's statutory framework.

(Cont'd)

For instance, if a child has been receiving special education in a public school, the parents would be obligated, before removing the child from public school and seeking private school tuition reimbursement, to give the school district ten days written notice, and their tuition claim could be reduced or denied if they acted unreasonably. 20 U.S.C. § 1412(a)(10)(C)(iii)(III). If the student had never set foot in a public school placement, however, the parents would have no obligation to give notice to the school district and their tuition claim would not be subject to reduction or denial based upon their unreasonable actions.

5. Congress has continued to amend the IDEA to provide still more mechanisms for collaboration between the public school and the parent, including making provisions for reconvening the IEP team and liberal post-placement amendments to an IEP (20 U.S.C. § 1414(d)(3) and (4)(B) and (e)), and resolution sessions and mediation (20 U.S.C. § 1415). *See Schaefer v. Weast*, 546 U.S. 49, 53-54 (2005).

POINT III

BURLINGTON DID NOT ESTABLISH THAT TUITION REIMBURSEMENT IS AVAILABLE WHERE A STUDENT HAS NOT PREVIOUSLY RECEIVED SPECIAL EDUCATION AND RELATED SERVICES FROM THE PUBLIC AGENCY

The plain meaning of the statute is also consistent with this Court's decision in *Burlington*. In an attempt to avoid the fact that their interpretation of subsection (C)(ii) would render it meaningless, respondent and the Solicitor General argue that the subsection merely codifies *Burlington*. *See, e.g.*, Brief for Respondent at p. 19. The Solicitor General goes so far as to argue that the subsection "is not superfluous because it addresses the most common situation in which reimbursement is sought" (Brief for the United States as Amicus Curiae Supporting Respondent at p. 7), and then makes the remarkable claim that adhering to the statute's plain language would work an implied repeal of a reimbursement remedy clearly established in the IDEA's predecessor statute by *Burlington*. *See* Brief for the United States as Amicus Curiae Supporting Respondent at p.17. These arguments fail, because *Burlington* did not address the situation presented in this case, in which the student has not previously received special education and related services under the authority of the public entity.

The student in *Burlington* had, prior to being removed from public school, received special education and related services pursuant to an IEP in a public school. *Burlington*, 471 U.S. at 361. After extensive and lengthy discussions which resulted in the school district proposing a new placement for the student, the student's parents rejected the proposed new IEP and enrolled him in a private school. *Id.* at 362. Thus, *Burlington*, on its facts, established the availability of a tuition reimbursement remedy where the student had been removed from a public school placement. It did not establish that such a remedy was

available where the student had not previously received special education and related services, because the Court had no occasion to consider that question.[6]

Respondent's and the Solicitor General's arguments are therefore implausible. It is implausible to argue that Congress, in enacting subsection (C)(ii), simply codified *Burlington* and did so specifically by using the "previously received" language, but meant for that language to be meaningless where a student has not previously received special education and related services from the public entity.

Similarly, the Solicitor General's implied repeal argument falls of its own weight. According to the Solicitor General, subsection (C)(ii) was meant to codify that tuition reimbursement is available where a student has previously received special education and related services from the public agency, the "most common situation in which reimbursement is sought." Yet the Solicitor General also claims incorrectly that *Burlington* stands for the proposition—beyond its facts—that tuition reimbursement is available where the student has not received special education or related services from the public agency. Thus, the Solicitor General contends that the plain language of the statute would work an implied repeal of the rule already established in the IDEA that tuition reimbursement is available in that situation. If the Solicitor General were right about *Burlington's* holding, however, it would mean that Congress, in enacting subsection (C)(ii), codified *Burlington's* facts but not its holding. This argument makes no sense.

In any event, since *Burlington* did not establish that tuition reimbursement is available where the student has not previously received special education and related services from the public

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6. In *Florence County Sch. Dist. Four et al. v. Carter*, 510 U.S. 7 (1993), the student also previously received special education and related services from the public entity, and thus the Court's decision did not address the question presented in the instant case.

entity, subsection (C)(ii) did not repeal—impliedly or otherwise—a remedy that was clearly established under the statute. Subsection (C)(ii) establishes that private school tuition is available in the factual situation presented by *Burlington*, and only in that factual situation.

If respondent and the Solicitor General are wrong about the purpose of subsection (C)(ii), as they are, only two conclusions may be drawn: (1) the language at issue here is meaningless; or (2) petitioner's interpretation of the statute is correct. Moreover, the notion that the statute, in piecemeal fashion, addresses a portion of the issue rather than the entire issue rests on an assumption that the statutory language is unclear and does not provide states with the notice required by Spending Clause legislation.

POINT IV

ALTHOUGH THE LEGISLATIVE RECORD REGARDING SUBSECTION (C)(ii) IS SPARSE, THAT RECORD SUPPORTS PETITIONER'S INTERPRETATION OF THE STATUTE

The legislative history, while not extensive, identifies problems that Congress intended to address in the 1997 amendments. Discussing those amendments, of which subsection (C)(ii) was a part, Representative Castle stated:

> This law ... has had unintended and costly consequences. For example, it has resulted in children being labeled as disabled when they were not. It has resulted in school districts unnecessarily paying expensive private school tuition for children. It has resulted in cases where lawyers have gamed the system to the detriment of schools and children ... This bill makes it harder for parents to unilaterally place a child in elite private schools at

> public taxpayer expense, lowering costs to local school districts.

143 Cong. Rec. H2498 (daily ed. May 13, 1997). In enacting subsection (C)(ii), Congress directly addressed the problems identified by Rep. Castle.

Subsection (C)(ii) prevents parents from trying to obtain tuition reimbursement when they have no intention that their child will attend public school. Parents who have no interest in cooperating with the public school remain free to send their children to private school, but they must do so at their own expense, and they may receive only those services outlined in 20 U.S.C. § 1412(a)(10)(A).

POINT V

THE DEPARTMENT OF EDUCATION'S COMMENTS REGARDING SUBSECTION (C)(ii) ARE NOT ENTITLED TO DEFERENCE

Because the language of the statute is clear, this Court need not refer to the Department of Education's comments regarding subsection (C)(ii).[7] Even if the statute's language were not clear, however, this Court should not defer to the DOE's commentary because it is devoid of analysis.

Respondent argues that the U.S. Department of Education ("DOE") has rejected the Board's interpretation of subsection (C)(ii). Brief for Respondent at p. 26. The Solicitor General also urges deference to the Department of Education's commentary in the event that this Court concludes that the statute is ambiguous on the question presented. Brief for the United States as Amicus Curiae Supporting Respondent at pp. 7-8. These arguments are unavailing.

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7. *See* 64 Fed. Reg. at 12,601-02; 71 Fed. Reg. at 46,599.

Pursuant to *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the initial question for the reviewing court is whether the statute is ambiguous. If, as here, the statute is not ambiguous, judicial inquiry ends. 467 U.S. at 843. If, on the other hand, a court determines that the statute is silent or ambiguous in relevant respects, then that court may accept the agency's interpretation if it is reasonable. *Id. See also United States v. Mead Corporation*, 533 U.S. 218 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (weight accorded to an administrative judgment in a particular case will depend *inter alia* upon the thoroughness evident in its consideration and the validity of its reasoning).

The DOE's commentary contains no analysis of the "previously received" language, and ignores not only the plain language of the statute but the implementing regulation, implemented by the DOE itself, which specifically requires, *inter alia*, that the student must have previously received special education and related services from the public agency in order for the parent to be entitled to tuition reimbursement.[8] Moreover, the commentary makes the same mistake as do respondent and the Solicitor General; it assumes that *Burlington* and *Carter* answer a question they did not address. For these reasons alone, the DOE's commentary is unreasonable, and this Court should not defer to DOE's interpretation of the subsection.

Most important, however, if this Court finds the statutory language to be ambiguous, it should not defer to the Secretary's commentary because an ambiguous statute cannot provide the clear notice that Spending Clause legislation requires.

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8. 34 C.F.R. § 300.403. *See also* 64 *Federal Register* 12,406, Changes in Subpart D – Children in Private Schools, showing enumerated proposed changes.

POINT VI

THE STUDENT HAS NEVER RECEIVED SPECIAL EDUCATION AND RELATED SERVICES UNDER THE AUTHORITY OF THE BOARD

Perhaps out of recognition that his interpretation of subsection (C)(ii) is untenable, respondent asserts that the student received special education and related services from the Board because an Individualized Education Plan was developed. Ignoring his rejection of the placement offered by the Board, respondent argues, without support from the statute or case law, that children who receive IEPs from their school district have received special education and related services from the public agency. Brief for Respondent at p. 31.

The IDEA provides definitions of both special education and related services, and an IEP is included nowhere in those definitions.[9] There is no legal basis, then, for equating the development of the IEP with the provision of special education and related services.

Furthermore, respondent's argument reflects a misunderstanding of the IDEA's provisions for evaluations and for development and implementation of the IEP. The school district must "obtain informed consent from the parent . . . before conducting an [initial] evaluation." 20 U.S.C. § 1414(a)(1)(D)(i)(I). Then, following the initial evaluation and development of the IEP, the school district must obtain further "informed consent from the parent . . . before providing special education and related services to the child." 20 U.S.C. § 1414(a)(1)(D)(i)(II). If the parent does not consent, the school district cannot implement the IEP. Indeed, it cannot even seek an order at an impartial hearing to permit it to provide special education and related services over the objection of the parent. 20 U.S.C. § 1414 (a)(1)(D)(ii)(II). Instead, where the parent "refuses to consent to the receipt of special education and related

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9. 20 U.S.C. §§ 1401 (26); 1401 (29).

services," the school district has no obligation to provide a free appropriate public education. 20 U.S.C. § 1414(a)(1)(D)(ii)(III).

Thus, the statute makes two things clear. First, it differentiates the initial evaluation from the provision of special education and related services—they are not the same thing.[10] Second, it makes clear that where a parent has not consented, the IEP cannot be implemented, and the child does not receive special education and related services. Respondent's argument that the IEP is the provision of special education and related services, then, is simply incorrect.

Respondent and the Solicitor General also argue that the student received special education and related services when the Board paid the student's tuition for the 1997-98 and 1998-99 school years at Gaynor pursuant to stipulations of settlement and discontinuance (Brief for Respondent at p.35; Brief for the United States as Amicus Curiae Supporting Respondent at p. 9).[11] That argument fails because, as this Court recently

10. Respondent asserts that the Act's definition of related services includes the "early identification and assessment of disabling conditions in children." Brief for Respondent at p. 33. Subsection (C)(ii) requires that a child "previously received special education and related services." Thus, even if respondent were correct that this definition incorporates an initial evaluation done for the purpose of developing the IEP, he must show that the student here received both special education and related services under the authority of the public agency. Respondent cannot make that showing, especially given that respondent rejected the recommended placement offered to the student.

11. The terms of the settlements are inadmissible pursuant to Fed R. Evid. 408, which provides that a settlement agreement may not be used to prove "liability for, invalidity of, or amount of a claim that was disputed as to validity or amount." *See, e.g., Arizona v. California*, 530 U.S. 392, 414 (2000); *United States v. International Bldg. Co.*, 345 U.S. 502, 505 (1953). This Court has acknowledged that settlements ordinarily occasion no issue preclusion unless it is clear that the parties intend their agreement to have such an effect, noting that "consent agreements ordinarily are intended to preclude any further litigation on

(Cont'd)

acknowledged, special education and related services are defined as services that are, *inter alia*, provided under public supervision and direction.[12] *Winkelman v. Parma City School District*, 127 S. Ct. 1994, 2000-2001 (2007). Respondent cannot demonstrate that the Board had a hand in supervising or directing the education provided by Gaynor to the student and, consequently, cannot demonstrate that the student previously received special education and related services under the authority of the Board.

POINT VII

STATES ARE NOT ON CLEAR NOTICE THAT § 1412(a)(10)(C)(ii) PERMITS TUITION REIMBURSEMENT WHEN THE STUDENT HAS NOT PREVIOUSLY RECEIVED SPECIAL EDUCATION AND RELATED SERVICES UNDER THE AUTHORITY OF THE PUBLIC AGENCY

Respondent's attempts to avoid the plain meaning of subsection (C)(ii) run directly into a Spending Clause problem.[13] Respondent's argument boils down to the proposition that

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the claim presented but are not intended to preclude further litigation on any of the issues presented (citation omitted)." *Arizona v. California*, *supra*, 530 U.S. at 414. Moreover, respondent is precluded from relying upon the tuition reimbursements from the 1997 and 1998 school years in the instant appeal because the stipulations of settlement and discontinuance state that "[e]xcept with respect to the enforcement of any of the matters stated herein, or as provided in this paragraph, this Stipulation shall not be admissible in, and is not related to, any other proceedings, litigation or settlement negotiations, whether between the parties or otherwise (A10, A19)."

12. 20 U.S.C. § 1412(a)(1); 34 C.F.R. § 300.121(a); 34 C.F.R. § 300.13.

13. This Court may consider petitioner's Spending Clause argument, having held that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). *See also Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 245 n.2 (2000).

although subsection (C)(ii) sets forth that hearing officers or courts may authorize tuition reimbursement when a student has previously received special education or related services from the school district, that subsection does not mean that they may not authorize tuition reimbursement where the student has not received special education and related services from the school district.

Respondent's interpretation is, to say the least, not an obvious interpretation of the statute's words. Subsection (C)(ii), on its face, sets forth a hearing officer's or court's authority to authorize private school tuition reimbursement. It says, *inter alia*, that a hearing officer or court may require the public agency to reimburse the parents of "a child with a disability, who previously received special education and related services under the authority of a public agency." A state official, reading this grant of authority, would hardly find it clear that the statute authorizes a hearing officer or court to order private school tuition reimbursement to parents of a child with a disability who did not previously receive special education and related services under the authority of the public agency. Accordingly, if respondent's interpretation is correct, the statute does not provide the clear notice required of Spending Clause legislation. *See Arlington Cent. Sch. Dist. Bd. Of Ed. v. Murphy*, 126 S. Ct. 2455 (2006).

Respondent claims that *Burlington* put school districts on notice that if they fail to provide FAPE, they are potentially liable for private school tuition reimbursement. Brief for Respondent at p. 14. However, in *Burlington* and *Carter, supra*, the students had in fact previously received special education and related services from the public entity. Therefore, those cases could not possibly put school districts on notice of an obligation to provide tuition reimbursement where a student has never received special education and related services from the public entity.

The simple fact is that respondent's interpretation would impose upon school districts the burden of paying private school tuition in circumstances where they otherwise would not. For that reason, respondents' reliance on this Court's decision in *Winkelman v. Parma City School District*, *supra*, is unavailing. In *Winkelman*, the Court noted that its "determination that IDEA grants independent, enforceable rights [to parents] does not impose any substantive condition or obligation on the States." 127 S. Ct. at 2006. In contrast, respondents' interpretation in this case would "result in a change to the States' statutory obligations" regarding when they must reimburse parents for private school tuition. *Id.* The result of respondent's interpretation will be significant expenditures of funds. Respondents' unsupported argument that his interpretation of the statute would impose no greater financial burden on school districts is wholly without merit.

Respondent's interpretation of subsection (C)(ii) impermissibly imposes a burden upon school districts to pay private school tuition where the student has never received special education and related services from the public agency. Since the statute does not clearly impose that obligation, the Court's Spending Clause jurisprudence prohibits it.

CONCLUSION

Petitioner respectfully requests that the judgment of the Second Circuit be reversed.

Respectfully submitted,

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No. 06-637

In the Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, PETITIONER

v.

TOM F., ON BEHALF OF GILBERT F., A MINOR CHILD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act permits an award of private school tuition reimbursement when a child with a disability has been denied a free appropriate public education but the child has not "previously received special education and related services under the authority of a public agency." 20 U.S.C. 1412(a)(10)(C)(ii).

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INTEREST OF THE UNITED STATES

This case concerns whether the parents of a child with a disability who has not "previously received special education and related services under the authority of a public agency" (20 U.S.C. 1412(a)(10)(C)(ii)) are eligible under the Individuals with Disabilities Education Act of 2004 (IDEA or Act) for an award of private school tuition reimbursement when a court determines that the child has been denied a free appropriate public education and that such reimbursement is appropriate. The Department of Education administers IDEA and has authority to promulgate regulations necessary to ensure compliance with the Act. See 20 U.S.C. 1406. The Department has taken the position in commentary accompanying final regulations that IDEA authorizes an award of tuition reimbursement in such circumstances. 71 Fed. Reg. 46,599 (2006); 64 Fed. Reg. 12,602 (1999). The United States therefore has a substantial interest in the question presented.

STATEMENT

1. IDEA provides federal grants to States for assistance in the education of children with disabilities and conditions such funding upon a State's compliance with extensive goals and procedures.[1] The Act requires recipients of federal funding "to ensure that all children with disabilities have available to them a free appropriate public education," 20 U.S.C. 1400(d)(1)(A), including the special-education services necessary to meet the particular needs of each child with a disability. See 20 U.S.C. 1412(a)(4); see also 20 U.S.C. 1412(a)(5); see generally *Board of Educ.* v. *Rowley*, 458 U.S. 176, 200-203 (1982). The Act requires States to provide a free appropriate

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[1] Congress reauthorized and amended IDEA in 2004. See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (20 U.S.C. 1400 *et seq.*). Unless otherwise indicated, citations are to the statute as amended in 2004.

public education "to all children with disabilities residing in the State between the ages of 3 and 21, inclusive," 20 U.S.C. 1412(a)(1)(A), subject to only two limitations relating to special state rules "respecting the provision of public education to children" ages "3 through 5 and 18 through 21," 20 U.S.C. 1412(a)(1)(B)(i), and to incarcerated persons aged 18 through 21, 20 U.S.C. 1412(a)(1)(B)(ii).

The Act specifies that the special education services must be "provided at public expense," 20 U.S.C. 1401(9)(A), and "at no cost to parents," 20 U.S.C. 1401(29). The Act "contemplates that [special] education will be provided where possible in regular public schools, * * * but * * * in private schools at public expense where this is not possible." *School Comm. of the Town of Burlington* v. *Department of Educ.*, 471 U.S. 359, 369 (1985) (*Burlington*). The Act also contains a "[c]hild find" provision that requires States to ensure that "[a]ll children with disabilities residing in the State, including * * * children with disabilities attending private schools," are "identified, located, and evaluated." 20 U.S.C. 1412(a)(3)(A); see 20 U.S.C. 1412(a)(10)(A)(ii).

The Act specifies that a local school district need not pay the cost of private education of a child with a disability "if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. 1412(a)(10)(C)(i). The Act also states that a court or hearing officer may require a state agency to reimburse parents for the cost of private school for a child with a disability, "who previously received special education and related services under the authority of a public agency," if "the court or hearing officer finds that the agency had not made a free appropriate public education available to the child." 20 U.S.C. 1412(a)(10)(C)(ii). The Act further provides that in an action brought under IDEA a court "shall grant such relief as the court determines is appro-

priate," 20 U.S.C. 1415(i)(2)(C)(iii), including—this Court has held—private school tuition reimbursement in the case of a child with a disability who was denied a free appropriate public education. *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 15-16 (1993); *Burlington*, 471 U.S. at 369-371.

IDEA affords parents an array of procedural safeguards. See 20 U.S.C. 1414, 1415; see also *Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2000-2002 (2007). The Act requires local school systems to develop an individualized education program (IEP) for each child with a disability in consultation with parents and in accordance with statutory requirements. See 20 U.S.C. 1412(a)(4), 1414(d). If parents are not satisfied with an IEP, they may file a complaint with the State or local educational agency "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," 20 U.S.C. 1415(b)(6)(A), and obtain "an impartial due process hearing," 20 U.S.C. 1415(f)(1)(A). Any party aggrieved by a decision at the final administrative stage may "bring a civil action" in federal district court or state court of competent jurisdiction. 20 U.S.C. 1415(i)(1) and (2)(A).

2. This case arises out of a complaint filed under IDEA by respondent Tom F., the father of Gilbert F., a child with a disability, against petitioner, arguing that Gilbert had been denied a free appropriate public education and seeking private school tuition reimbursement. In the fall of 1995, respondent enrolled Gilbert in kindergarten at the Stephen Gaynor School (Gaynor), a private school that specializes in educating children with learning disabilities. Pet. App. A1-A2; J.A. 66a-67a. In 1996, respondent invoked Gilbert's right under IDEA to receive special education services from petitioner by requesting that Gilbert be evaluated and provided with an IEP. Pet. 2. Petitioner evaluated Gilbert and classified him as learning disabled. J.A. 67a. In 1997 and 1998, petitioner en-

tered into two agreements, titled Stipulation of Settlement and Discontinuance, to pay Gilbert's tuition at Gaynor for each of those years. Pet. Br. 7; C.A. App. 5-11, 14-20.

Petitioner scheduled a meeting of the Committee on Special Education (CSE) for May 28, 1999, to review Gilbert's IEP and recommend an appropriate placement for him for the upcoming 1999-2000 school year. J.A. 45a. Because a parent was unable to attend the meeting on that date, it was postponed and reconvened on June 23, 1999. No one from Gaynor was able to attend the rescheduled meeting, including Gilbert's special education teacher. J.A. 46a, 52a, 70a. On July 29, 1999, roughly a month before the beginning of the new school year, petitioner mailed respondent notice that petitioner recommended that Gilbert be placed in a special education classroom in a public school, the New York City Lower Lab School for Gifted Education, for the upcoming school year. J.A. 46a. Respondent disagreed with the proposed placement and kept Gilbert at Gaynor. *Ibid.*

3. Respondent sought administrative review of petitioner's recommendation and reimbursement for Gilbert's tuition at Gaynor for the 1999-2000 school year. J.A. 19a. On April 6, 2001, following hearings, an impartial hearing officer issued a decision granting respondent's request for reimbursement. J.A. 19a-36a. The hearing officer found that petitioner had failed to offer Gilbert an educational program that met his needs, that Gaynor was an appropriate program for Gilbert, and that respondent "did everything asked of him * * * in regard to this matter." J.A. 34a-35a. Petitioner appealed and a state review officer affirmed those findings, concluded that respondent was entitled to tuition reimbursement, and dismissed the appeal. J.A. 66a-76a.

4. Petitioner brought an action in the United States District Court for the Southern District of New York challenging the State's administrative decision. Pet. 9. On January 3,

2005, the district court granted petitioner's motion for summary judgment. Pet. App. A1-A13. Pointing to Section 1412(a)(10)(C)(ii) of IDEA, the district court ruled "that where a child has *not* previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from a parent's unilateral placement of a child in private school." *Id.* at A8. Because the district court viewed Section 1412(a)(10)(C)(ii) as a categorical bar to reimbursement, it did not consider the administrative finding that Gilbert was denied a free appropriate public education.

5. On August 9, 2006, the court of appeals vacated the district court's judgment and remanded the case for further proceedings in light of *Frank G.* v. *Board of Educ.*, 459 F.3d 356 (2d Cir.), petition for cert. pending, No. 06-580 (filed Oct. 23, 2006). In *Frank G.*, the Second Circuit held that IDEA does not "establish a threshold requirement that a disabled child must have previously received public special education and related services in order to be eligible for reimbursement" for the cost of private school. J.A. 85a.

The court of appeals explained in *Frank G.* that Section 1412(a)(10)(C)(ii) "does not say that tuition reimbursement is *only* available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents whose child had not previously received special education and related services." J.A. 97a. The court further reasoned that reading that language into Section 1412(a)(10)(C)(ii) would conflict with other provisions of the Act, including the Act's broad equitable relief provision, J.A. 98a-100a, and lead to the "untenable" result that parents would have "to jeopardize their child's health and education in this manner in order to qualify for * * * reimbursement." J.A. 106a.

SUMMARY OF ARGUMENT

When a child with a disability has been denied a free appropriate public education, IDEA authorizes an award of private school tuition reimbursement regardless of whether the child previously received public special education services.

The centerpiece of IDEA is its guarantee of a free appropriate public education for "all children with disabilities." 20 U.S.C. 1412(a)(1)(A). As this Court has twice unanimously held, IDEA's broad "appropriate" relief provision—which directs a court to "grant such relief as [it] determines is appropriate," 20 U.S.C. 1415(i)(2)(C)(iii)—authorizes a court to award private school tuition reimbursement to the parents of a child with a disability who unilaterally place their child in a private school pending a proceeding in which they prove that a proposed IEP was inadequate. *Carter*, 510 U.S. at 15-16; *Burlington*, 471 U.S. at 369. A contrary conclusion, the Court has explained, would require parents to "go along with the [proposed] IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement," and that, in turn, would deprive parents and children with disabilities of the Act's central guarantee of a "*free* appropriate public education." *Id.* at 370.

Section 1412(a)(10)(C)(ii), which was enacted as part of the 1997 amendments to IDEA, addresses the most common situation in which private school tuition reimbursement is sought —*i.e.*, with respect to children with disabilities who previously received public special education services. The provision, however, neither explicitly nor impliedly eliminates the preexisting reimbursement remedy for parents of a child who, for whatever reason, has not previously received public special education services. To the contrary, the language of Section 1412(a)(10)(C)(ii) is permissive, rather than restrictive, and it does not place any limit on the authority of a court to grant appropriate relief in other circumstances. Moreover, reading

Section 1412(a)(10)(C)(ii) to have that effect would contradict the Act's express guarantee of a free appropriate public education to "*all* children with disabilities"; conflict with other provisions of the Act that confirm that the State's obligation to provide a free appropriate public education is not dependent on a child's previous receipt of public special education services; and produce absurd results.

Reading the permissive language of Section 1412(a)(10)(C)(ii) to eliminate pre-existing equitable authority in other circumstances also would flout the presumption against implied repeals. Petitioner attempts to overcome that presumption by arguing that Section 1412(a)(10)(C)(ii) would be rendered superfluous if the Act's "appropriate" relief provision is read to continue to permit parents in respondent's shoes to seek reimbursement. That effort should be rejected. Section 1412(a)(10)(C)(ii) is not superfluous because it addresses the most common situation in which reimbursement is sought. Moreover, reading Section 1412(a)(10)(C)(ii) to establish a non-exclusive reimbursement remedy is consistent with the immediately preceding subsection (Section 1412(a)(10)(C)(i)), which establishes a general rule that reimbursement is not available when a public agency has made available a free appropriate public education. In addition, that reading is necessary to give effect to other provisions of the Act—including the Act's express guarantee of a free appropriate public education for "all children with disabilities" (20 U.S.C. 1412(a)(1)(A))—and to av id leaving parents in respondent's shoes without a remedy in the absence of evidence that Congress clearly intended that result.

Taking the Act as a whole and applying settled canons of construction leads to the conclusion that private school tuition reimbursement may be awarded in the circumstances here. However, to the extent that the Court concludes that IDEA is ambiguous on the question presented, it should defer to the

Department's interpretation of the Act. In 1999 and 2006, the Secretary of Education (Secretary), following notice-and-comment rule-making, issued comments accompanying final regulations implementing IDEA providing that the authority to award reimbursement under the Act's "appropriate" relief provision is "independent of" the authority to award reimbursement under Section 1412(a)(10)(C)(ii) and that reimbursement is therefore available in the circumstances here. That interpretation is entitled to deference.

The Spending Clause (U.S. Const. Art. I § 8, Cl. 1) does not compel a different conclusion. First, because petitioner did not invoke the Spending Clause below, this Court should not entertain its efforts to do so now. Second, consistent with this Court's recent decision in *Winkelman*, 127 S. Ct. at 2006, a determination that parents are eligible for reimbursement regardless of whether their child has previously received public special education does not require special notice, because such a determination does not expand States' substantive obligations to provide a free appropriate publi c education for "all children with disabilities." 20 U.S.C. 1412(a)(1)(A). Third, and in any event, IDEA, this Court's precedents, and the Secretary's formal interpretation of the 1997 amendments have provided the States with any requisite notice. See *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 182-184 (2005).

ARGUMENT

PRIVATE SCHOOL TUITION REIMBURSEMENT MAY BE AWARDED TO THE PARENTS OF A CHILD WHO HAS NOT PREVIOUSLY RECEIVED PUBLIC SPECIAL EDUCATION SERVICES WHEN THE CHILD HAS BEEN DENIED A FREE APPROPRIATE PUBLIC EDUCATION

Under IDEA, "all children with disabilities"—regardless of whether they are enrolled in public or private school—enjoy the right to a free appropriate public education.

20 U.S.C. 1412(a)(1)(A). The remedial question presented in this case arises only after a finding has been made that a child with a disability has been denied a free appropriate public education. Petitioner contends that IDEA provides no authority to award private school tuition reimbursement to such a child if the child did not previously receive public special education. That position is contradicted by the text of IDEA, this Court's precedent, and the formal interpretation of the agency charged with implementing IDEA. Although a court has discretion to withhold such an award based on equitable considerations in any given case, Congress has nevertheless authorized the award of private school tuition reimbursement to the parents of a child who has been denied a free appropriate public education, including a child who has not previously received public special education services.[2]

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[2] Although this brief addresses the question presented by petitioner, the government's view is that the factual premise of that question is unsound, because Gilbert has "previously received special education and related services under the authority of a public agency" (20 U.S.C. 1412(a)(10)(C)(ii)). After receiving testing and evaluation services provided by petitioner, Gilbert was enrolled in a school that provides special education services and petitioner agreed to reimburse respondent up to $18,000 for tuition costs to attend that school during the 1997-1998 and 1998-1999 school years, provided that respondent complied with certain conditions. See C.A. App. 5, 14. The Stipulation of Settlement and Discontinuance (¶ 22) governing that arrangement provides that, "[e]xcept with respect to the enforcement of any of the matters stated herein, * * * [the] Stipulation shall not be admissible in, and is not related to, any other proceedings, litigation or settlement negotiations, whether between the parties or otherwise." C.A. App. 10, 19. That provision, however, does not alter the fact that Gilbert has received special education services under the authority of petitioner and subject to conditions imposed by petitioner. Because the premise of the question presented is unsound, the Court may wish to dismiss the writ as improvidently granted. In the alternative, the Court may wish to affirm on the alternative ground that Gilbert did previously receive special education services authorized by petitioner, or permit the courts to consider that issue on remand.

A. IDEA Explicitly Guarantees A Free Appropriate Public Education To "All Children With Disabilities"

IDEA was enacted "to ensure that *all* children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. 1400(d)(1)(A) (emphasis added). To that end, IDEA specifies that a State must make a free appropriate public education available to "all children with disabilities residing in the State between the ages of 3 and 21, inclusive." 20 U.S.C. 1412(a)(1)(A). Congress set out only two "[l]imitation[s]" on that obligation, one relating to children "aged 3 through 5 and 18 through 21" where the obligation would conflict with State law or practice, 20 U.S.C. 1412(a)(1)(B)(i), and the other relating to incarcerated persons, 20 U.S.C. 1412(a)(1)(B)(ii). Neither of those limitations is implicated in this case.

To carry out its mandate, IDEA directs States to identify and evaluate "[a]ll children with disabilities residing in the State, including * * * children with disabilities attending private schools." 20 U.S.C. 1412(a)(3)(A); see 20 U.S.C. 1412(a)(10)(A)(ii). IDEA also "requires school districts to develop an IEP for each child with a disability," *Winkelman*, 127 S. Ct. at 2000, who seeks a free appropriate public education, including children who currently attend private schools when their parents request an IEP. IDEA contains detailed provisions governing the substantive criteria for an IEP, 20 U.S.C. 1414, as well as procedural safeguards, 20 U.S.C. 1415. IDEA grants parents the right to challenge a school district's proposed IEP in an "impartial due process hearing" before the state or local educational agency, 20 U.S.C. 1415(f)(1), and

to file a civil action in the event of an adverse administrative outcome, 20 U.S.C. 1415(i)(2)(A).[3]

B. As This Court Has Held, IDEA's "Appropriate" Relief Provision Authorizes Tuition Reimbursement For Children Denied A Free Appropriate Public Education

Since its enactment in 1975, IDEA has provided that in a civil action such as this one brought under the Act, a court "shall grant such relief as [it] determines is appropriate." 20 U.S.C. 1415(i)(2)(C)(iii). Although IDEA has been comprehensively amended on several occasions by Congress over the 30-plus years since its enactment, that language has remained essentially unchanged. This Court has twice unanimously affirmed that the broad scope of that language authorizes a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." *Burlington*, 471 U.S. at 369; see *Carter*, 510 U.S. at 15-16.

In *Burlington*, the parent of a child with disabilities (Michael) unilaterally enrolled Michael in a private school after determining that the Town of Burlington's proposed placement for fourth grade was inappropriate and in light of Mi-

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[3] While all children with disabilities are protected by IDEA, children who are voluntarily enrolled in private school—and who are not seeking a free appropriate public education—have no "individualized right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. 300.454(a). As to those children, a State's obligation to pay for special education services is based on a formula tied to the amount of federal funds the school district receives under IDEA and the number of private school students in the district. 20 U.S.C. 1412(a)(10)(A)(i)(I)-(II); 34 C.F.R. 300.453. But that limitation does not apply to private school children who, like Gilbert, seek a free appropriate public education from a public agency (*i.e.*, a proposed IEP that would permit them to obtain public special education services), or who are placed in private school by a public agency.

chael's poor performance in public school under an IEP for third grade. After an administrative officer and a court had found that the proposed IEP for Michael was inappropriate, the parent obtained reimbursement for Michael's private school tuition. In a unanimous decision written by then-Justice Rehnquist, this Court held that IDEA's "appropriate" relief provision authorized a court to award such tuition reimbursement. *Burlington*, 471 U.S. at 370.

In reaching that result, the Court explained that absent such a remedy, "the child's right to a *free* appropriate public education * * * would be less than complete," *Burlington*, 471 U.S. at 370, and that "Congress undoubtedly did not intend this result," *ibid.* Moreover, the Court emphatically rejected the notion that IDEA posed a cruel choice to parents of children with disabilities of "go[ing] along with the IEP to the detriment of their child if it turns out to be inappropriate or pay[ing] for what they consider to be the appropriate placement." *Ibid.*[4] At the same time, however, the Court stressed that parents who unilaterally place their children in private school during a pending challenge to a proposed IEP "do so at their own financial risk." *Id.* at 373-374.

Eight years later, in *Carter*, *supra*, the Court unanimously reaffirmed *Burlington* and held that "a court may order reimbursement for parents who unilaterally withdraw their child

[4] The Court similarly rejected the Town's contention that the parent waived any right to reimbursement by violating a stay-put provision calling for the child to "remain in the then current educational placement" while administrative proceedings were pending. *Burlington*, 471 U.S. at 371 (citing 20 U.S.C. 1415(e)(3)). The Court explained that applying the stay-put provision under these circumstances would compel parents to "leave the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement." *Id.* at 372. That is unacceptable because "[t]he Act was intended to give handicapped children *both* an appropriate education and a free one," and the Court refused to read the statute "to defeat one or the other of those objectives." *Ibid.* (emphasis added).

from a public school that provides an inappropriate education under IDEA." *Carter*, 510 U.S. at 9. There, the parents of a disabled child (Shannon) removed Shannon from a public school and enrolled her in private school for the tenth grade because they were dissatisfied with the school district's IEP, which had been implemented when Shannon was in ninth grade for the last month of the school year. See *Carter* v. *Florence County Sch. Dist.*, 950 F.2d 156, 159 (4th Cir. 1991). The Court authorized tuition reimbursement even though the private school where Shannon was enrolled did not meet state education standards, explaining that construing IDEA "to bar reimbursement in the circumstances of this case would defeat th[e] statutory purpose" to "ensure that children with disabilities receive an education that is both appropriate and free." *Carter*, 510 U.S. at 13-14.

The Court dismissed the school district's concerns about the financial burden of allowing reimbursement in these circumstances. *Carter*, 510 U.S. at 15-16. The Court pointed out that the financial burden could be avoided entirely by "giv[ing] the child a free appropriate public education in a public setting, or plac[ing] the child in an appropriate private setting of the State's choice." *Id.* at 15. "This is IDEA's mandate," the Court explained, "and school officials who conform to it need not worry about reimbursement claims." *Ibid.* The Court further observed that parents such as Shannon's who unilaterally change their child's placement "do so at their own financial risk" because they may obtain reimbursement "*only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act." *Ibid.*

Burlington and *Carter* underscore that IDEA's broad remedial provision (Section 1415(i)(2)(C)(iii))—and its reimbursement component—are integral to ensuring that eligible children receive a public education that is *both* free *and* ap-

propriate. Although *Burlington* and *Carter* both involved children with disabilities who had received some public special education services before their parents became dissatisifed and opted for private school (in *Carter*, the services were for only one month), neither decision suggests that a child's receipt of such services is relevant to the reimbursement determination, much less constitutes a threshold condition for reimbursement. Accordingly, in the wake of *Burlington*, lower courts routinely awarded reimbursement to parents of children who had not previously received public special education services as long as they established that their child was denied a free appropriate public education and that the private placement was appropriate.[5]

C. Section 1412(a)(10)(C)(ii) Does Not Deprive A Court Of Its Authority To Grant Tuition Reimbursement In Circumstances Not Described In That Provision

In 1997, following two years of hearings, Congress amended IDEA. Although Congress—which is presumed to be aware of this Court's decisions—left the Act's "appropriate" relief provision unchanged, it added a new provision (Section 1412(a)(10)(C)) addressing the payment for education of children with disabilities enrolled in private schools. According to petitioner (Br. 21), the "clear meaning of the plain language of [Section] 1412(a)(10)(C)(ii) is that where a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from the parents unilateral placement of the child in private

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[5] See, *e.g.*, *Gadsby* v. *Grasmick*, 109 F.3d 940 (4th Cir. 1997); *Seattle Sch. Dist. No. 1* v. *B.S.*, 82 F.3d 1493 (9th Cir. 1996); *Mary P.* v. *Illinois State Bd. of Educ.*, 919 F. Supp. 1173 (N.D. Ill. 1996); *Ivan P.* v. *Westport Bd. of Educ.*, 865 F. Supp. 74 (D. Conn. 1994), aff'd, 101 F.3d 686 (2d Cir. 1996) (Table); *Edwards-White* v. *District of Columbia*, 785 F. Supp. 1022 (D.D.C. 1992); *Shirk* v. *District of Columbia*, 756 F. Supp. 31 (D.D.C. 1991); *Lapides* v. *Coto*, 559 Educ. Handicapped L. Rep. 387 (Jan. 4, 1988).

school." Neither Section 1412(a)(10)(C)(ii) nor the Act as a whole supports that argument.

Petitioner's interpretation is contradicted by the text of Section 1412(a)(10)(C)(ii) and its surrounding provisions. Far from speaking in restrictive terms, Section 1412(a)(10)(C)(ii) is phrased in *permissive* terms. It provides that if "parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child" in private school without the consent or referral by the public agency, "a court or hearing officer *may* require the agency to reimburse the parents for the cost of that enrollment if * * * the agency had not made a free appropriate public education available to the child in a timely manner." (emphasis added). The provision does not say that a court may *only* grant such relief in those circumstances and it does not say that a court may *not* grant such relief in other circumstances. Petitioner's interpretation therefore requires the Court to insert limiting language into Section 1412(a)(10)(C)(ii) that Congress did not. Cf. *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 687 (1962) ("[W]e are not at liberty, * * * to add to or alter the words employed to effect a purpose which does not appear on the face of the statute.").[6]

Furthermore, the critical phrase on which petitioner relies—"who previously received special education and related services under the authority of a public agency,"—is a dependent clause that operates in a descriptive rather than

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[6] Because Section 1412(a)(10)(C)(ii) does not expressly (or impliedly) limit the authority to grant reimbursement in circumstances other than those described in the section, the "specific governs over the general" canon of construction does not help petitioner. As this Court has explained, that canon operates "as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision." *Varity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996). Here, as in *Varity*, giving effect to IDEA's "appropriate" relief provision to a parent in respondent's shoes would not undermine any "limitation" described in Section 1412(a)(10)(C)(ii).

conditional manner. That usage accords with the most plausible explanation for the phrase: Congress was simply codifying the reimbursement remedy in the most common situation in which that remedy had been sought (including in *Burlington* and *Carter*). But the fact that Congress used such descriptive language, especially when coupled with the permissive "may require" language just discussed, refutes petitioner's argument that Congress intended the phrase to divest the pre-existing authority under Section 1415(i)(2)(C)(iii) to grant reimbursement when a child did not previously receive such services.

Especially in light of *Burlington* and the broad statutory authorizations for equitable relief to ensure a free *and* appropriate education, what petitioner's argument needs is not limited language of authorization, such as that in Section 1412(a)(10)(C)(ii), but language that expressly negates the availability of tuition reimbursement in the circumstances of this case. The absence of any relevant limiting language is underscored by the fact that the statute expressly precludes tuition reimbursement in circumstances *not* present here.

The immediately preceding subsection of the statute—titled "In general"—reaffirms (as noted in *Burlington* and *Carter*) that a public agency may not be required to reimburse the cost of private school tuition "of a child with a disability —at a private school * * * if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school." 20 U.S.C. 1412(a)(10)(C)(i). That subsection, unlike the one on which petitioner relies, is both expressly limiting and expressly conditional. It underscores that parents who opt for private school bear the risk if an adjudicator determines that the proposed IEP was adequate. Nothing in that subsection remotely suggests that public agencies may also avoid such reimbursement when they have *denied* a child with a disability

a free appropriate public education, as long as the child has not previously received public special education.

It is also noteworthy that despite numerous hearings and debates on the 1997 amendments, there is no concrete evidence in the legislative record that Congress intended to cut back on the Act's "appropriate" relief provision or that Congress disagreed with the rationale of *Burlington* or *Carter*. Cf. *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 63 (2004). Indeed, "[n]o one at the time—no Member of Congress, no Department of Education official, no school district or State—expressed th[at] view." *Zuni Pub. Sch. Dist. No. 89* v. *Department of Educ.*, 127 S. Ct. 1534, 1541 (2007). The fact that there is no evidence that Congress sought to eliminate the authority to grant private tuition reimbursement when a child with a disability has been denied an appropriate placement bolsters the conclusion that Congress was simply providing more concrete guidance in the most typical situation in which reimbursement is sought and not, as petitioner contends, scaling back the Act's substantive protections.[7]

D. Petitioner's Reading Works An Implied Repeal

After *Burlington* and *Carter* and before the 1997 amendments to IDEA, it was clear that parents in respondent's circumstances were entitled to reimbursement. The burden of petitioner's argument, therefore, is that Section 1412(a)(10)(C)(ii)'s reference to "parents of a child * * *

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[7] Section 1412(a)(10)(C)(iii) does authorize a court to "reduc[e] or den[y]" the "cost of reimbursement described in clause (ii)." But even that provision is phrased in permissive rather than mandatory terms. In addition, while Section 1412(a)(10)(C)(iii) by virtue of its cross-reference to subsection (ii) does not apply to the situation where a parent is seeking reimbursement with respect to a child who has not previously received public special education services, a court would retain the authority to reduce or deny such an award for any equitable reason and presumably would look to Section 1412(a)(10)(C)(iii) in determining what relief was "appropriate." See *Varity*, 516 U.S. at 515.

who previously received" public special education services effectively repealed that pre-existing right to seek tuition reimbursement. This Court has repeatedly held that "'repeals by implication are not favored' and will not be presumed unless the legislature's intention 'to repeal [is] clear and manifest.'" *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2522 (2007) (quoting *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981)). As this Court has emphasized, "[a]n implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch* v. *Smith*, 538 U.S. 254, 273 (2003) (quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)). Neither of those conditions is satisfied here.

Giving effect to this Court's interpretation of IDEA's "appropriate" relief provision (Section 1415(i)(2)(C)(iii)) creates no "irreconcilable conflict" with Section 1412(a)(10)(C)(ii). As discussed, Section 1412(a)(10)(C)(ii) is phrased in permissive terms and addresses the most common situation in which reimbursement claims have arisen. Recognizing that courts retain their authority under Section 1415(i)(2)(C)(iii) to grant reimbursement to parents in respondent's shoes does not in any way conflict with Section 1412(a)(10)(C)(ii). Likewise, Section 1412(a)(10)(C)(ii) does not "cover[] the whole subject" addressed by the "appropriate" relief provision; by its terms, it addresses only a particular fact pattern. In addition, as discussed in the preceding section, there is no basis for concluding that Section 1412(a)(10)(C)(ii) was intended, much less "clearly intended," to operate as a "substitute" for the Act's "appropriate" relief provision in situations where a child has not previously received public special education services.

Petitioner's argument is essentially that if Section 1412(a)(10)(C)(ii) is not read to work an implied repeal, it will be rendered superfluous. But express grants of authority

that may not be statutorily necessary are commonplace and such belt-and-suspenders provisions are not remotely sufficient to work an implied repeal. Moreover, petitioner overstates its argument in contending that anything but its implied repeal theory would render Section 1412(a)(10)(C)(ii) a "nullity." (Br. 21). As this Court has explained, "[s]tatutory provisions may simply codify existing rights or powers." *Mallard* v. *United States Dist. Ct.*, 490 U.S. 296, 307 (1989). Here, Section 1412(a)(10)(C)(ii) codifies the right to pursue reimbursement for the most common situation, presented in both *Burlington* and *Carter*, in which a reimbursement right arises. Moreover, Congress not only codified that right, but also established criteria that a court "may" consider in deciding whether to reduce or deny reimbursement. 20 U.S.C. 1412(a)(10)(C)(iii). In short, Section 1412(a)(10)(C)(ii) does not "*sub silentio* or by implication bar parents from seeking to vindicate" (*Winkelman*, 127 S. Ct. at 2002) the right to reimbursement embodied in Section 1415(i)(2)(C)(iii).[8]

E. Petitioner's Reading Conflicts With Key Provisions Of IDEA And Its Structure

Petitioner's interpretation of Section 1412(a)(10)(C)(ii) also cannot be squared with other provisions of IDEA. "[A] proper interpretation of [IDEA] requires a consideration of the entire statutory scheme." *Winkelman*, 127 S. Ct. at 2000. Viewed as a whole, IDEA provides for reimbursement of private school tuition incurred by the parent of a disabled child who has been denied a free appropriate public education

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[8] To the extent that there is some redundancy between the relief available under Section 1412(a)(10)(C)(ii) and that under Section 1415(i)(2)(C)(iii), that is not problematic or unusual. As this Court has explained, "[r]edundancies across statutes are not unusual events in drafting," and courts should give effect to all provisions absent a "positive repugnancy." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992) (internal quotation marks omitted).

whether or not the child previously received public special education services.

First, and most fundamentally, petitioner's reading conflicts with IDEA's central guarantee of providing a free appropriate education to "*all* children with disabilities." 20 U.S.C. 1412(a)(1)(A) (emphasis added). That guarantee is subject to only two limitations, see 20 U.S.C. 1412(a)(1)(B), neither of which is implicated here. As this Court recognized in *Burlington*, denying tuition reimbursement to the parents of a child who was unilaterally enrolled in private school because of the parents' concerns over a proposed IEP that they subsequently prove to be inadequate would render "the child's right to a *free* appropriate public education * * * less than complete." *Burlington*, 471 U.S. at 370; see *id.* at 372 (explaining that forcing parents to subject a child with a disability to what they believe is an inappropriate placement or obtaining an appropriate placement only at the expense of "sacrificing any claim for reimbursement" would deny parents the Act's right to "both an appropriate education and a free one").

This Court recently observed that it found "nothing in [IDEA] to indicate that when Congress required States to provide adequate instruction to a child 'at no cost to parents,' it intended that only some parents would be able to enforce that mandate." *Winkelman*, 127 S. Ct. at 2005 (quoting 20 U.S.C. 1401(29)). This Court refused to adopt a reading of the statute that would "leave[] some parents without a remedy," *ibid.*, but petitioner's reading of Section 1412(a)(10)(C)(ii) would do just that by depriving one class of parents of a reimbursement remedy (*viz.*, the parents of children who have not previously received public special education services), even though a court has found that their child was denied a free appropriate public education. There is no reason to conclude

that Congress sought to relegate parents in respondent's shoes, or their children, to such a second-class status.[9]

Petitioner's position works a hardship not only on parents of children enrolled in private school (who enjoy the Act's protections), but also on parents of children enrolled in public school. Under petitioner's view, the parents of a child with a disability who is enrolled in public school would forfeit the opportunity to seek tuition reimbursement if they believe that a proposed initial IEP is inadequate and unilaterally place their child in private school to obtain the services that they believe are appropriate pending a successful challenge to the IEP. That is particularly true where, as was the case here, the IEP at issue was proposed over the summer and the parents must make a choice where to enroll their child for the upcoming school year. Moreover, petitioner's position imposes a potential hardship on all children who enter the special education system—whether enrolled in public or private school—because there is always some point at which a child has not previously received public special education services.[10]

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[9] Of course, parents must still comply with other statutory requirements, including those governing the IEP process, before they may seek relief. At no stage of the process, however, is any talismanic significance placed on whether the child previously received public special education services. Petitioner's effort to insert that precondition at the remedy stage, once a violation has been established, is both at odds with the statutory structure and sound policy, which is why it has been rejected by Congress and the Secretary. See Part G, *infra*.

[10] A child may receive "special education" or "related services" covered by the Act whether enrolled in public or private school. 20 U.S.C. 1401(26) and (29). As a result, petitioner's position potentially penalizes all children entering the special education system. IDEA's infants and toddlers program does not eliminate that problem. See 20 U.S.C. 1431 *et seq.* In many cases, children with disabilities are not evaluated, identified, and offered special education and related services until after they begin kindergarten. Moreover, even as to infants and toddlers, petitioner's position requires parents to forfeit reimburse-

Second, petitioner's reading is at odds with IDEA's child-find requirement. The Act does not treat previously unserved students as second-class citizens. To the contrary, the Act obligates States to identify, locate, and evaluate "[a]ll children with disabilities residing in the State, including children with disabilities * * * attending private schools." 20 U.S.C. 1412(a)(3)(A); see 20 U.S.C. 1412(a)(10)(A)(ii). The purpose of *finding* such previously unserved children is of course to ensure that the State *makes available* to them a free appropriate public education. Petitioner's interpretation would have the States seek such students out, but then deny them, in cases like this, a free appropriate public education by requiring parents to subject their child to demonstrably inadequate public special education services in order to be eligible for tuition reimbursement. In *Burlington*, this Court observed that subjecting parents to such a dilemma contravenes the Act's basic guarantees. 471 U.S. at 370.

Third, and more generally, petitioner's reading conflicts with the elaborate substantive and procedural requirements of IDEA that are geared towards ensuring that all children with disabilities actually receive a free appropriate public education, and that parents who believe that a proposed IEP is inappropriate have an opportunity to challenge that IEP and, when successful, obtain "appropriate" relief. See *Winkelman*, 127 S. Ct. at 2000-2002 (detailing parents rights); see also *Schaeffer* v. *Weast*, 546 U.S. 49, 51-53 (2005). That is because, under petitioner's position, a court may find that a child has been denied a free appropriate public education, but nonetheless lack the authority to grant the relief necessary to provide a free *and* appropriate education.

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ment for tuition-related services if they do not subject their child to public special education, even if a proposed plan is entirely inadequate. Cf. *M.M.* v. *School Bd.*, 437 F.3d 1085 (11th Cir. 2006).

F. Petitioner's Reading Contravenes The Express Purpose Of IDEA And Produces Absurd Results

Adopting petitioner's reading of Section 1412(a)(10)(C)(ii) also would frustrate the express purpose of IDEA—*i.e.*, "to ensure that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. 1400(d)(1)(A). This Court has twice held that the remedy of reimbursement of private school tuition is essential to enforcing IDEA's requirement that all children with disabilities be provided an education that is both free *and* appropriate, and has instructed that IDEA "should not be interpreted to defeat [that] objective[]." *Burlington*, 471 U.S. at 372; see *Carter*, 510 U.S. at 14-15. Yet under petitioner's approach, the parents of a child who has not previously received public special education services are not entitled to tuition reimbursement, even when a proposed placement is inappropriate.

Indeed, when considered in light of IDEA's broader objectives, petitioner's reading of Section 1412(a)(10)(C)(ii) produces absurd results and should be rejected for that reason as well. See, *e.g.*, *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 509-511 (1989); *id.* at 527 (Scalia, J., concurring in the judgment); *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); see also *Winkelman*, 127 S. Ct. at 2004 (interpreting IDEA to avoid "incongruous results"). Under petitioner's reading, parents of a child with a disability who believe—correctly—that a proposed IEP is inadequate must subject their child to the inappropriate program to qualify for reimbursement. One district court has suggested that the problem of having to place a disabled child in an inappropriate program could be alleviated by placing the child in that program for "as short a period as one day." *Baltimore City Bd. of Comm'rs* v. *Taylorch*, 395 F. Supp. 2d 246, 250 (D. Md. 2005).

But that holding only highlights the potential absurdities that flow from petitioner's position.[11]

Appropriate education during a child's formative years is absolutely critical to a child's development. Moving a child from one school to another itself can prove highly disruptive to a child on an educational as well as psychological level. That is true for any youth; it may be especially true for a child with a learning disability. It would be absurd to conclude that Congress created a regime whereby any parents, including those in respondent's shoes, would have to subject their child to a program that they believe would be to their child's detriment in order to qualify for tuition reimbursement if they prove that to be true. "The potential for injustice in this result is apparent." *Winkelman*, 127 S. Ct. at 2005.

Petitioner contends that this analysis is at odds with the rule that "an IEP may not be presumed to be invalid until the parent demonstrates otherwise." Br. 23 (citing *Schaffer*, *supra*). That is incorrect. As this Court has stressed, parents who unilaterally enroll their children in private schools pending a challenge to a proposed IEP "do so at their own financial risk." *Burlington*, 471 U.S. at 374; see *Carter*, 510 U.S. at 15. The remedial question presented by this case only arises once a parent has successfully carried his burden of proving that the proposed IEP was in fact inadequate.

Petitioner contends (Br. 34) that his reading is necessary to "control" costs. Congress, however, has made clear its policy of making a free appropriate education available to "all children with disabilities." 20 U.S.C. 1412(a)(1)(A). As this Court admonished in *Carter* in rejecting essentially the same

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[11] Petitioner's reading also leads to the absurd result that reimbursement may be denied to parents of children with disabilities seeking public special education services when a State wrongly refuses to identify their child as disabled. See, *e.g.*, *Mary P.*, 919 F. Supp. at 1175, 1181 (ordering school district to reimburse parents of child with disability for cost of private speech therapy where school district "steadfastly denied [child's] eligibility for such services").

argument, "public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice." 510 U.S. at 15. And while Congress has indeed sought to control costs associated with IDEA and related litigation, see *Schaffer*, 546 U.S. at 58-59, there is no evidence that Congress sought to deny a complete remedy to parents who *prevail* in an action alleging the denial of a free appropriate public education.[12]

Petitioner contends (Br. 36) that his reading supports Congress's goal "to educate handicapped children with nonhandicapped children whenever possible." But this "mainstreaming" objective—embodied in the Act's "least restrictive environment" provision—by its terms applies to "children in public *or* private institutions." (20 U.S.C. 1412(a)(5)(A) (emphasis added)). In other words, the Act's mainstreaming goal places a preference on educating children with disabilities in "regular classes," *ibid.*, and not on whether those classes take place in a public or private school. Moreover, that preference is not absolute and even petitioner's proposed placement did not call for Gilbert to be "mainstreamed." J.A. 34a.

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[12] Petitioner's amici point to the costs of educating children with disabilities in private schools and the number of private placements. Only a tiny fraction (about 1.5%) of children with disabilities are educated in private school at public expense, that number has remained largely consistent since *Burlington* was decided, and the cost of educating those children in private schools constitutes an even tinier fraction (about 0.24%) of the overall costs of public education. See J. Greene and M. Winters, *Debunking a Special Education Myth*, Educ. Next, Spring 2007, at 68-70. Moreover, the "overwhelming majority" of these private placements were made by public agencies themselves. Br. for Nat'l School Boards Ass'n et al. 20. In any event, as discussed, there is no evidence that Congress sought to empower public agencies to "control" costs under IDEA by denying any child a free appropriate public education, including by proposing manifestly inadequate IEPs and thus discouraging parents from availing themselves of their right to a free *and* appropriate education.

Finally, petitioner suggests that parents will seek to manipulate the IEP process. Br. 9, 13. But as discussed, parents who unilaterally place their children in private school "do so at their own financial risk." *Carter*, 510 U.S. at 15 (quoting *Burlington*, 471 U.S. at 347). Moreover, even after a violation of IDEA is established, courts have broad "equitable" discretion in determining what relief is "appropriate," including "the appropriate and reasonable level of reimbursement that should be required" as well as the actions of parents. *Id.* at 15-16; see *Burlington*, 471 U.S. at 374; *id.* at 366-367. The hearing officer in this case found that respondent "did everything asked of him * * * in regard to this matter." J.A. 35a.[13]

G. The Formal Position Of The Agency Charged With Implementing IDEA Is Entitled To Deference

For the reasons discussed above, IDEA authorizes tuition reimbursement to a parent in respondent's shoes. To the extent that the Court has any doubt as to that conclusion, however, it should defer to the Department's considered interpretation of the Act. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984); *Defenders of Wildlife*, 127 S. Ct. at 2531-2533.

In commentary published in the *Federal Register* that accompanied the Department's final regulations implementing the 1997 Amendments to the Act, the Secretary directly addressed the question presented and stated:

> [H]earing officers and courts retain their authority recognized in *Burlington* and * * * *Carter* * * * to award

[13] There is an additional practical check on abusive litigation in this context. As Justice Scalia recently explained, "[a]ctions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe that the FAPE was inadequate." *Winkelman*, 127 S. Ct. at 2011 (concurring in the judgment in part and dissenting in part).

> "appropriate" relief if a public agency has failed to provide a [free appropriate public education], including reimbursement and compensatory services under section 615(*l*)(2)(B)(iii) [20 U.S.C. 1415(i)(2)(B)(iii)] in instances in which the child has not yet received special education and related services. This authority is independent of their authority under section 612(a)(10)(C)(ii) [20 U.S.C. 1412(a)(10)(C)(ii)] to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.

64 Fed. Reg. at 12,602.

Likewise, in formal comments that followed notice-and-comment rule-making and that were published in the *Federal Register* with the Department's final regulations implementing the 2004 amendments to the Act, the Secretary stated:

> [W]e do not believe it is appropriate to include in these regulations a provision relieving a public agency of its obligation to provide tuition reimbursement for a unilateral placement in a private school if the child did not first receive special education and related services from the [local educational agency].
>
> This authority is independent of the court's or hearing officer's authority under section 612(a)(10)(C)(ii) [20 U.S.C. 1412(a)(10)(C)(ii)] of the Act to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.

71 Fed. Reg. at 46,599.

That interpretation is entitled to deference. This Court has long recognized that official agency interpretations of a statute formally adopted pursuant to notice-and-comment rule-making, formal adjudication, or some other "relatively formal administrative procedure tending to foster

* * * fairness and deliberation" are entitled to *Chevron* deference. *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001); see *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007) (extending deference to agency interpretation of its regulations contained in an "Advisory Memorandum" because the interpretation "reflects [the agency's] considered views"); *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 477-482 (2001) (applying *Chevron* to agency statements in explanatory preamble to final regulations).

In this case, the Secretary's commentary was the product of this formal process and was issued in connection with her authority to "issue regulations * * * that * * * are necessary to ensure that there is compliance with the specific requirements of this chapter." 20 U.S.C. 1406(a). As such, the Secretary's interpretation is entitled to *Chevron* deference so long as it is reasonable. For the reasons discussed above, the agency's interpretation is, at a minimum, reasonable.

H. *Pennhurst* Does Not Assist Petitioner

Petitioner contends for the first time before this Court (Br. 38-41) that it cannot be ordered to reimburse respondent because IDEA was enacted pursuant to Congress's spending authority, which requires Congress set out conditions to a State's acceptance of federal funds "unambiguously." *Pennhurst Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Because petitioner failed to invoke spending authority principles below, the Court should decline to consider that argument in the first instance. *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001) (citation omitted).

In any event, petitioner's new-found interest in the Spending Clause (U.S. Const. Art. I., § 8, Cl. 1) is of no avail. This past Term, in *Winkelman*, the Court rejected the argument that *Pennhurst* principles required Congress to provide clear notice that IDEA conferred on parents independent rights. 127 S. Ct. at 2006. The Court explained that "[o]ur determi-

nation that IDEA grants to parents independent, enforceable rights does not impose any substantive condition or obligation on States they would not otherwise be required by law to observe." *Ibid.* Similarly here, IDEA unambiguously imposes on States the substantive obligation to provide a free appropriate public education to "all children with disabilities." 20 U.S.C. 1412(a)(1).[14]

Moreover, for the reasons discussed above, the text of IDEA, this Court's precedent, and formal interpretation of the Department published in the *Federal Register* put States on clear notice that reimbursement of private school tuition is available when a school district denies a child with a disability a free appropriate public education, regardless of whether the child previously received public special education services. See *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 182-184 (2005) (rejecting Spending Clause challenge to cause of action under Title IX where statute, case law, and federal regulations all provided requisite notice). Likewise, States have long been on notice that they can avoid such reimbursement simply by providing a free appropriate public education. What is sought here is not clear notice, but a windfall in the form of an exception to a long-recognized right to reimbursement under IDEA. Nothing in this Court's spending authority principles supports that result.[15]

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[14] The appropriate measure of financial burden in this circumstance is the primary one of providing a free appropriate public education. See *Burlington*, 471 U.S. at 370-371 (holding that reimbursement of private school tuition is not "damages" but constitutes "expenses that [the State] should have paid all along and would have borne in the first instance had it developed a proper IEP"); *Carter*, 510 U.S. at 15 (explaining that school districts that "conform to [IDEA's mandate] need not worry about reimbursement claims").

[15] Petitioner's reliance on *Pennhurst* is unavailing for another reason. Under this Court's cases, "a recipient [of federal funding] may be held liable to third-party beneficiaries for intentional conduct that violates the clear terms of the relevant statute." *Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002). When a

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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school district violates IDEA's guarantee of a free appropriate public education, it may thus be held liable to parents for reimbursement for "expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." *Burlington*, 471 U.S. at 370-371.

APPENDIX

1. 20 U.S.C. 1400 (Supp. IV 2004), provides in pertinent part:

Short title; findings; purposes

* * * * *

(d) Purposes

The purposes of this chapter are—

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

* * * * *

2. 20 U.S.C. 1401 (Supp. IV 2004), provides in pertinent part:

Definitions

Except as otherwise provided, in this chapter:

* * * * *

(9) Free appropriate public education

The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

* * * * *

(26) Related services

(A) In general

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

* * * * *

(29) Special education

The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

* * * * *

3. 20 U.S.C. 1412 (Supp. IV 2004), provides in pertinent part:

State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(B) Limitation

The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children—

(i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order

of any court, respecting the provision of public education to children in those age ranges; and

(ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this subchapter be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility—

(I) were not actually identified as being a child with a disability under section 1401 of this title; or

(II) did not have an individualized education program under this subchapter.

* * * * *

(3) Child find

(A) In general

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

* * * * *

(10) Children in private schools

(A) Children enrolled in private schools by their parents

* * * * *

(ii) Child find requirement

(I) In general

The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools.

* * * * *

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school with-

out the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the

evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) Exception

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement—

(I) shall not be reduced or denied for failure to provide such notice if—

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if—

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

* * * * *

4. 20 U.S.C. 1415 (Supp. IV 2004), provides in pertinent part):

Procedural safeguards

* * * * *

(i) Administrative procedures

* * * * *

(2) Right to bring civil action

* * * * *

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

* * * * *

No. 06-637

IN THE
SUPREME COURT OF THE UNITED STATES

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F., ON BEHALF OF GILBERT F., A MINOR CHILD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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INTEREST OF THE AMICUS CURIAE

Agudath Israel of America, founded in 1922, is a national Orthodox Jewish organization. One of Agudath Israel's functions is to advocate the interests of the member schools of Torah Umesorah – The National Society for

Hebrew Day Schools, and the students and parent bodies they serve. Over the last few decades, the educational needs of learning disabled and otherwise handicapped children have occupied an increasingly prominent position on the Orthodox Jewish community's agenda of priorities. In recognition of this trend, Agudath Israel in 2000 established a division – "Project LEARN" – to work with parents and schools in the Orthodox Jewish community to help special needs children access appropriate and necessary educational services.

In the Second Circuit below, when the court was considering *Frank G.* v. *Board of Education of Hyde Park*, 459 F.3d 356 (2d Cir. 2006), Agudath Israel participated (along with New York Lawyers for the Public Interest, Inc., Advocates for Children of New York, Inc., The Legal Aid Society of New York City and several other groups) in a larger *amicus curiae* brief expressing support for the position the court ultimately adopted. Agudath Israel continues to support that position, and the specific arguments advanced by the respondent and *amici* on its behalf, but respectfully submits this short independent *amicus* presentation, with the consent of the parties, to focus briefly on two issues of particular concern.[1]

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

I. REQUIRING A SPECIAL NEEDS CHILD TO SUFFER THROUGH AN INAPPROPRIATE PUBLIC SCHOOL PLACEMENT AS A PREREQUISITE TO TUITION REIMBURSEMENT FOR A PARENT'S UNILATERAL PLACEMENT IN AN APPROPRIATE PRIVATE SCHOOL IS INDEED "ABSURD"

In its *Frank G.* decision below, the Second Circuit, applying the general rule of statutory construction that "ambiguous statutes are to be construed so as to avoid absurd results," concluded that the result would indeed be absurd if 20 U.S.C. §1412 (a)(10)(C)(ii) would be read to preclude reimbursement where a special needs child in an appropriate private school setting had not previously attended the inappropriate public school placement offered by the public agency. 459 F.3d at 372.[2]

---

[2] The Second Circuit offered two reasons it considered such a reading of § 1414 (a)(10)(C)(ii) "absurd": It would preclude tuition reimbursement for children if their disabilities were detected before school age, and it would require parents to acquiesce to an inappropriate placement in order to preserve their right eventually to seek reimbursement for an appropriate private school placement. 459 F. 3d at 372. Our discussion in the text focuses on this second reason. However, we would respectfully offer yet an additional reason why petitioner's reading of the statute could lead to results that are "absurd." School districts occasionally fail in their responsibility to offer a free and appropriate public education not by offering an inappropriate public school placement, but by offering no placement whatsoever. In such cases, if a parent finds a private school setting that is appropriate, tuition reimbursement would be unavailable under petitioner's reading of the statute because the child never received services from the public agency – despite the fact that the public

Petitioner pooh-poohs the Second Circuit's concern that forcing the child to accept a school district's recommended public school placement could be harmful to the child's development:

> "The Court of Appeals' assumption appears to be premised upon the notion that the public entity is unable to provide an appropriate education in the first place, and is incapable of reaching a speedy determination of the inappropriateness of the public placement where it is, in fact, inappropriate. There is, however, no basis in fact for an assumption that clearly discounts the expertise of school officials who are charged with the responsibility of performing their obligations under the Act.
>
> "In interpreting the 'previously received' language, the Court of Appeals assumed that the IEP will be inappropriate and will jeopardize the child's health and education. App. 105a. The IDEA does not require that a child would have to be enrolled for any minimum period of time in the school district's proposed placement prior to a unilateral private placement. Instead, the statute simply requires that the parent first give the public school's placement a try, which can hardly be characterized as an absurd result." [Petitioner's Brief at 22.]

Before a parent can recover tuition reimbursement for a unilateral private school placement, however, the parent must demonstrate to a hearing officer or a court of law that the school district failed in its duty to provide the child with a

---

agency never offered services. The absurdity of such an outcome requires no elaboration.

"free appropriate public education," and that in contrast the private school setting chosen by the parent is appropriate. *Schaffer* v. *Weast*, 546 U.S. 49 (2005). At issue, therefore, is a scenario where, for all the vaunted "expertise" of the public officials who recommended a public school placement for the child, the parent is ultimately vindicated in his judgment that the recommended placement was in fact inappropriate.

The entire premise of the IDEA is that children with special needs, even more so than mainstream children, require an educational setting that is appropriate for their specific circumstances. Getting it wrong could have far-reaching detrimental consequences for the healthy development of the child. As the court noted in *Connors* v. *Mills*, 34 F. Supp. 795, 804 (N.D.N.Y. 1998): "Given the fragile state of many disabled children and their dire need for constant and consistent care, even brief periods of inappropriate schooling could lead to tremendous educational, social, emotional and psychological deterioration."

In light of that reality, petitioner's contention that a parent, persuaded though he may be (and vindicated though he ultimately is) that the recommended public school placement is inappropriate for his child, must nonetheless "first give the public school's placement a try" – and petitioner's cavalier assurance that this indeterminate try-out period will not "jeopardize the child's health and education" – is not only "absurd"; it is cruel, and potentially destructive.

II. EVEN IF §1412 (A)(10)(c)(ii) IS READ AS PROVIDING THE EXCLUSIVE AVENUE TOWARD REIMBURSEMENT, THE PHRASE "PREVIOUSLY RECEIVED SPECIAL EDUCATION AND RELATED SERVICES UNDER THE AUTHORITY OF A PUBLIC AGENCY" DOES NOT IMPLY THAT THE PARENT MUST HAVE PREVIOUSLY "GIVE[N] THE PUBLIC SCHOOL'S PLACEMENT A TRY," AS PETITIONERS CLAIM, BUT ENCOMPASSES ANY FORM OF SPECIAL EDUCATION AND RELATED SERVICES PREVIOUSLY RECEIVED THROUGH A PUBLIC AGENCY

For the reasons spelled out in the Second Circuit's *Frank G.* ruling below, and in the briefs of respondent and other supporting *amici*, Agudath Israel urges the Court to reject petitioner's suggested reading of 20 U.S.C. §1412 (a)(10)(C)(ii) as establishing an absolute ban against the equitable remedy of tuition reimbursement if the child has not "previously received special education and related services under the authority of a public agency." This section of the IDEA should not be read as providing the exclusive means through which reimbursement may be sought.

But even if the Court concludes otherwise, and interprets the IDEA as allowing for reimbursement only where the child has "previously received special education and related services under the authority of a public agency," petitioner's proposed interpretation of this phrase as "simply requir[ing] that the parent first give the public school's

placement a try" [Petitioner's Brief at 22] is contrary to the plain language of the statute and must be rejected. Public agencies like the New York City Department of Education furnish various forms of special education and related services to children in public and nonpublic schools alike, and there is nothing in §1412 (a)(10)(C)(ii) that limits the types of services previously received to a school district's recommended public school placement.

The issue was squarely addressed in *M.M.* v. *School Board of Miami-Dade County*, 437 F.3d 1085 (11th Cir. 2006). Parents of a three-year-old hearing-impaired child, insisting that their child required a particular form of hearing therapy that the school district refused to provide, enrolled their child in a private pre-school program where the therapy was available, and sought IDEA reimbursement for the costs of the therapy. The school district argued that the parents' refusal to accept the district's proposed placement disqualified them from seeking reimbursement, as the child had not "previously received special education and related services under the authority of a public agency." The Eleventh Circuit rejected the district's argument, pointing out that the child had received various forms of special education and related services prior to the age of three under the county's Early Intervention Program, thereby satisfying the "previously received services" language of the statute. 437 F.3d at 1098.

The First Circuit dicta in *Greenland School District* v. *Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004) ("tuition reimbursement is only available for children who have previously received 'special education and related services' while in the public school system (or perhaps those who at least timely requested such services while the child is in public school)"), upon which petitioners rely, has no basis in the language or history of the law. Similarly, the District

Court's conjecture below that the "previously received services" language of the law "ensures that a parent's rejection of a public school placement is not based on mere speculation as to whether the recommended public school placement would have been inappropriate," *Board of Education of the City School District of the City of New York* v. *Tom F.*, 2005 WL 22866, 22868 (S.D.N.Y. 2005), is belied by the far more inclusive general language of the statute.

As noted above, there are many ways by which a public agency can provide special education and related services to students in a variety of settings, including students in private schools. Under the IDEA, "a proportionate amount of Federal funds" must be set aside to service private school children, which services may be provided on private school premises. 20 U.S.C. §1412 (10)(A)(i). Some states, including New York (N.Y.S. Education Law §3602-c), go even farther, independently mandating the equitable provision of special education services to nonpublic school students. Such services can include things like tutoring, speech and occupational therapy, health paraprofessionals, and the full range of other interventions that come under the heading of "special education and related services."

It is not uncommon, in Agudath Israel's experience, for a parent to enroll a child in a mainstream private school and receive special education and related services through a local school district; and then, when it becomes apparent that the child requires a more intensive special education program, to enroll the child in an appropriate private school for more intensive services. Assuming such a parent is able to demonstrate the failure of the school district to provide an appropriate public school program, he would clearly qualify under the plain language of §1412 (a)(10)(C)(ii) to seek reimbursement. The child has most assuredly "previously received special education and related services under the

authority of a public agency," even though he may never have attended public school.

Petitioner's attempt to rewrite the law to require "that the parent first give the public school's placement a try" is without foundation. It is also quite ironic, as it flagrantly violates the very principle upon which petitioner's main argument is premised: "Proper respect for the legislative powers vested in Congress implies that statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)." [Petitioner's Brief at 20.]

CONCLUSION

For the reasons set forth herein, Agudath Israel of America respectfully urges the Court to affirm the decision of the Second Circuit below, and to reject petitioner's faulty reading of 20 U.S.C. §1412 (a)(10)(c)(ii).

Respectfully submitted,

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On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF AUTISM SPEAKS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Autism Speaks is a not-for-profit organization dedicated to increasing awareness of autism spectrum disorders; funding research into the causes, prevention, treatments and potential cures for autism; and advocating for the needs of affected families. Following mergers with other national autism organizations, Autism Speaks is now the largest not-for-profit organization in the world by resources dedicated to autism research, education and treatment and has chapters across the United States, Canada, and the United Kingdom. Autism Speaks works closely with federal, state and local governments, as well as the U.S. military, to meet the needs of the ever-growing population of children with autism and parents of children with autism for access to treatment and education.

Autism Speaks can offer valuable insights into the special educational challenges faced by children with autism and their families and the potential impact of the Court's decision on thousands of families across the nation. Early, intensive and effective special education services are critical to give a young child the chance to remediate and overcome the symptoms of autism and to grow into a productive, self-sufficient member of society. The result advocated by the Petitioner would jeopardize parents' ability to secure appropriate services for their child at precisely the point when an appropriate program

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[1] Pursuant to this Court's Rule 37.6 we note that no part of this brief was authored by counsel for any party, and no person or entity other than Autism Speaks, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. This brief was filed with the written consent of all parties.

is most critical and, conversely, when the damage caused by an inappropriate placement is the gravest. The harm that an inappropriate program can cause to a child's development during this window of opportunity can never be fully corrected.

PRELIMINARY STATEMENT

Parents of children with autism simply cannot allow their child to languish in an inappropriate setting when every passing moment means the loss of developmental opportunities that can never be regained. For these children and their parents, every moment counts. Early and intensive educational intervention is critically important to the future of a child with autism. Almost all children with autism will benefit from early and appropriate services, and a significant number will even be able to join regular education classrooms and grow into adults able to enjoy independent and productive lives. But the window of opportunity is widest when the child is young, and the damage to the child's development if this opportunity is not seized can never be undone. Mistakes at this critical juncture are costly and often irremediable – parents and educators simply cannot afford to learn geology the morning after the earthquake.[2]

For more than twenty years, the Individuals with Disabilities Education Act ("IDEA") and its predecessor

[2] "We learn geology the morning after the earthquake, on ghastly diagrams of cloven mountains, up-heaved plains, and the dry bed of the sea." Ralph Waldo Emerson, *Considerations by the Way*, in THE CONDUCT OF LIFE 1088 (1860).

statutes have allowed parents of children with disabilities to recover reasonable expenses they are forced to incur when they reject a school district's inappropriate placement and secure proper services at their own expense. This important remedy provides relief to parents who have made the courageous and risky decision to dig into their own pockets – often at great personal sacrifice – to obtain an appropriate education for their disabled child in the face of the public school system's failures.

This remedy is particularly important to the parents of children with autism spectrum disorders, a population of parents that has grown exponentially in recent years. Until relatively recently, autism was a rarely-diagnosed and little-known condition, but is now more prevalent among children than Down syndrome, diabetes, cystic fibrosis, and cancer. With about 1 in 150 children in the United States suffering from autism spectrum disorder, this is the fastest-growing segment of the IDEA-covered population. As thousands of children are newly diagnosed every year, more parents become familiar with the burdens – emotional and financial – that accompany a diagnosis of autism spectrum disorder.

Because effective programs can be expensive to implement and require personnel with specialized training, parents sometimes face resistance from their public school system. This is far from universally true – more and more public school systems are becoming ready, willing and able to provide appropriate and effective services for autism. But there is a nationwide shortage of the specially-trained personnel needed to implement effective interventions, and federal studies show that the availability of effective programs for children with autism varies substantially from state-to-state and district-to-district.

Parents unlucky enough to live in districts that cannot or do not provide appropriate services are faced with the painful choice of accepting an educational placement that will damage their child's development or taking the risk of securing appropriate services on their own and seeking reimbursement.

Since autism frequently is not identified until the child is already school-aged, a significant number of parents will face this difficult choice when their child has never received any special education or related services from the public school system. The Petitioners and the *amici* who support them ask this Court to turn an otherwise risky choice for these parents into a draconian one – either accept inappropriate services that threaten to permanently and immeasurably retard their child's capacity for progress; or reject the proposed placement and secure appropriate services cut of their own pockets, with no prospect of reimbursement for the tremendous financial sacrifices they will make. In some circumstances, Petitioner's proposed rule would deny parents reimbursement even though the school district failed to offer any special education services at all. Meanwhile, other families whose children have received services unrelated to the inappropriate placement – because their child was initially misdiagnosed, because the family moved to a new school district, or for a multitude of other reasons – would remain free to reject the inappropriate placement without sacrificing their eligibility for reimbursement. No coherent rationale, statutory or otherwise, supports subjecting parents already struggling with the unique hardships of raising a child with autism to the cruel dilemma urged by Petitioner, and no rational justification warrants treating similarly-situated families so differently.

I. FOR AN EVER-GROWING POPULATION OF CHILDREN DIAGNOSED WITH AUTISM SPECTRUM DISORDERS, A FALSE START OR EDUCATIONAL MISSTEP CAN BE DEVASTATING

The devastating impact of autism is being experienced by an ever-growing number of families, as the incidence of autism spectrum disorder has risen dramatically in recent years. But as more and more families come to understand the financial and emotional burdens of grappling with this disorder, a scientific consensus has developed that early, intensive educational services offer children the prospect of ameliorating and even overcoming the developmental deficits associated with autism. With appropriate educational services, almost all children with autism can become more independent, and many can now claim realistic prospects for becoming self-sufficient. Some will even improve to the point where they appear indistinguishable from their non-disabled peers, participating in regular education classrooms alongside them. But these interventions are most effective when children with autism can be identified and served early; as children grow older, our ability to positively affect their development diminishes. An inappropriate educational placement, then, can have a devastating impact on a child's future. Even if the child later receives appropriate services, potential for improvement will have irreversibly slipped away with the passing of time.

A. As the Incidence of Autism Spectrum Disorder Has Mushroomed, Congress Increasingly Has Treated Autism as a National Priority

In recent years, autism has grown dramatically more prevalent. In 1961, it was confidently asserted that "[i]nfantile autism is a relatively rare form of schizophrenia and is not important from an epidemiological point of view." C.B. Ferster, *Positive Reinforcement and Behavioral Deficits of Autistic Children*, 32 CHILD DEVELOPMENT 437, 437 (1961), *reprinted in* CLASSIC READINGS IN AUTISM 53 (Anne M. Donnellan ed., 1985). Even in 1993,[3] shortly after the Department of Education began collecting statistics on autism, it classified only 19,058 children between 6 and 21 as having autism. 2 OFFICE OF SPECIAL EDUC. AND REHABILITATIVE SERVS., DEP'T OF EDUC., 26TH ANNUAL (2004) REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 25 (2006).[4] But in 2005, the Department of Education reported 192,643 autistic students between the ages of 6 and 21 – a more than tenfold increase. Office of Special Education and Rehabilitative Services, Office of Special Education Programs, U.S. Department of Education, Data Analysis System (DANS), 1976-2005, *Table 1-3, Students ages 6 through 21 served under IDEA, Part B, by disability*

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[3] Autism was added as a specifically-identified category of disability under IDEA by the Education of the Handicapped Act Amendments of 1990, Pub. L. 101-476, § 101, 104 Stat. 1103, 1142 (1990). It is very difficult to determine the prevalence of autism before the 1990s.

[4] Available at http://www.ed.gov/about/reports/annual/osep/2004/26th-vol-2.pdf (accessed June 17, 2007).

category and state: Fall 2005.[5] The Centers for Disease Control report rates as high as 1 in every 150 children. Catherine Rice, *Prevalence of Autism Spectrum Disorders – Autism and Developmental Disabilities Monitoring Network, 14 Sites, United States, 2002*, 56 MORBIDITY & MORTALITY WKLY. REV. SS-1 12, at 12 (Feb. 9, 2007) ("CDC, *14 Sites Study*").[6] With some 24,000 children with autism born each year, S. REP. NO. 109-318 at 3 (2006), autism spectrum disorder is now more common among children than Down syndrome, diabetes, cancer, cystic fibrosis, hemophilia, and sickle cell disease.[7]

As the incidence of autism has grown, Congress increasingly has made autism research and education a national priority. Autism was specifically identified as a disability under IDEA in 1991. *See* 20 U.S.C. § 1401(3)(a)(i); Education of the Handicapped Act Amendments of 1990, Pub. L. 101-476, Title I, § 101, Title IX, § 901(b)(10) to (20), 104 Stat. 1103, 1142, 1143 (1990). The Children's Health Act of 2000 directed the National Institutes of Health to expand and intensify autism research and mandated the creation of an Interagency Autism Coordinating Committee to coordinate autism research and other efforts within the Department of Health and Human

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[5] Available at http://www.ideadata.org/tables29th/ar_1-3.xls (accessed July 16, 2007).

[6] Available at http://www.cdc.gov/mmwr/PDF/ss/ss5601.pdf (accessed July 16, 2007).

[7] Figures available from the National Institutes of Health's National Human Genome Research Institute, http://www.genome.gov/10001204 (Down syndrome, cystic fibrosis, hemophilia, sickle cell disease), http://ndep.nih.gov/diabetes/youth/youth.htm (diabetes), and http://seer.cancer.gov/csr/1975_2004/results_merged/sect_28_childhood_cancer.pdf (cancer) (all sites accessed July 16, 2007).

Services. Pub. L. 106-310, Title I, 114 Stat. 1101 (2000). In 2004, IDEA was amended to encourage the Department of Education to support the development of programs to train special education teachers in autism disorders, 20 U.S.C. § 1462(b)(2)(G), and programs providing technical assistance and in-service training to schools and personnel servicing children with autism spectrum disorders, 20 U.S.C. § 1463(c)(8)(D). *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, Title I, 118 Stat. 2647, 2677 & 2682 (2004). Most recently, Congress enacted the Combating Autism Act of 2006 to, among other things, dramatically increase funding for autism research, detection and intervention and to promote interagency coordination of autism-related activities through the NIH. *See* Pub. L. 109-416, 120 Stat. 2821 (2006); S. REP. NO. 109-318 at 18-20.

B. With Appropriate Educational and Related Services, the Developmental Deficits Associated with Autism Can Be Ameliorated or Overcome

Autism is a spectrum disorder encompassing a range of developmental disorders related to impaired social function, impaired communication and repetitive, stereotyped behaviors. The degree and manifestation of impairments can vary dramatically from individual to individual, and the spectrum of disorders includes Asperger's Disorder and Pervasive Developmental Disorder, Not Otherwise Specified ("PDD-NOS"). *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION at 69-75 (4th ed. 2000) ("DSM-IV-TR"); S. REP. NO. 109-318, 2-3 (Aug. 3, 2006). Most children with autism

show an "inability to relate themselves in the ordinary way to people and situations from the beginning of life. . . ." Leo Kanner, *Autistic Disturbances of Affective Contact*, 2 NERVOUS CHILD 217 (1943), *reprinted in* CLASSIC READINGS IN AUTISM, at 41 (Anne M. Donnellan ed., 1985) (emphasis omitted). Impaired communication is another classic symptom of autism. Approximately 40 percent of children with autism do not talk, and others have difficulty learning to use language for communicative purposes. S. REP. NO. 109-318 at 2; DSM-IV-TR at 70. Many children with autism also demonstrate restricted and stereotypical patterns of behavior or interests, an insistence on predictability, and great difficulty coping with unexpected changes to their routine. S. REP. NO. 109-318 at 3; DSM-IV-TR at 71.

Symptoms generally manifest early, usually before the child's third birthday and in some cases almost from birth. S. REP. NO. 109-318 at 3, 9; AUTISM SPECTRUM DISORDER EXPERT WORKING GROUP, INTERAGENCY AUTISM COORDINATING COMM., NAT'L INST. OF MENTAL HEALTH, DEP'T OF HEALTH AND HUMAN SERVS., AUTISM SPECTRUM DISORDERS ROADMAP 8 (May 16, 2005) ("ROADMAP").[8] Yet children with autism frequently are not identified until after they have entered the public school system. S. REP. NO. 109-318 at 3, 9; ROADMAP at 8.[9] Though symptoms often are apparent at

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[8] Available at http://www.nimh.nih.gov/autismiacc/asdroadmap.pdf (accessed July 16, 2007). The Working Group was created by the Interagency Autism Coordinating Committee at the National Institute of Mental Health. *Id.* at 2.

[9] With a median age at diagnosis of 52-56 months, half of autistic children are not diagnosed until they are nearly 5 years old or later. Catherine Rice, *Prevalence of Autism Spectrum Disorders: Autism and Developmental Disabilities Monitoring Network, Six Sites, United*

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a young age, they can be overlooked or mistaken for emotional disturbance, mental retardation or deafness and special training is required to recognize and properly diagnose the signs of autism.[10]

While the cause or causes of autism are still unclear, there is broad agreement that, if properly diagnosed at a young age, the symptoms of autism often can be significantly ameliorated through education. As discussed below, with appropriate and *early* intervention – as soon as possible, while the child's developing brain has the greatest degree of "neurologic plasticity" – it is possible for most children to make significant progress in communication, adaptive behaviors, and socialization. *See, e.g.*, Tristram Smith and O. Ivar Lovaas, *Intensive and early behavioral intervention with autism: the UCLA young autism project*, 10 INFANTS & YOUNG CHILD. 67, 69-72 (1998). Appropriate education offers the possibility that children with autism can achieve self-sufficiency and become functioning,

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States, 2000, 56 MORBIDITY & MORTALITY WKLY. REV. SS-1 1, at 1 (Feb. 9, 2007). In some locations, the median age of diagnosis is 66 months, meaning that half of children diagnosed with autism are not identified until after they are more than 5½ years old. CDC, *14 Sites Study* at 20.

[10] *See, e.g., M.S. v. Fairfax County Sch. Bd.*, No. 1:05cv1476(JCC), 2007 WL 1378545, at *4 (E.D. Va. May 8, 2007) (school board classified child as non-categorical with mild mental retardation and speech and language impairment and did not acknowledge that the child was autistic until he completed middle school); Carol Tavris, *Commentary: And Babies Don't Come From Storks, Either; Science: The Alleged Link Between Vaccines And Autism Is Just The Latest Example Of Finding Causation Out Of Coincidence*, L.A. TIMES, May 7, 2000, at M5 ("Autism is not easy to diagnose accurately, and is often misdiagnosed by public school personnel.") (internal quotations omitted).

contributing members of society rather than permanent financial and emotional burdens on their families and on the public treasury.[11]

C. Taking Timely Advantage of the "Window of Opportunity" Is Critical to a Child's Ability to Remediate or Overcome the Symptoms of Autism

There is "abundant scientific evidence" that early, intensive instruction "can result in dramatic improvements for children with autism: successful integration in regular schools for many, *completely normal functioning* for some." Gina Green, *Early Behavioral Intervention for Autism*, in BEHAVIORAL INTERVENTION FOR YOUNG CHILDREN WITH AUTISM: A MANUAL FOR PARENTS AND PROFESSIONALS 29, 29 (Catherine Maurice et al. eds., 1996) (emphasis in original). Over the course of the last two decades, "virtually every study" has found that early and intensive intervention is effective, and there is now "little doubt" that appropriate intervention "can produce large, comprehensive, lasting and meaningful improvements in many important domains for a large proportion of children with autism." *Id.* at 38.[12]

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[11] For descriptions of autistic children who have grown into productive – even remarkable – adults, *see, e.g.*, OLIVER SACKS, AN ANTHROPOLOGIST ON MARS 244-296 (1995); CLARA CLAIBORNE PARK, EXITING NIRVANA (2001); STEPHEN M. SHORE, BEYOND THE WALL (2001); KAMRAN NAZEER, SEND IN THE IDIOTS (2006).

[12] *See* Geraldine Dawson and Julie Osterling, *Early intervention in autism*, in THE EFFECTIVENESS OF EARLY INTERVENTION 307, 314 (1997) (reviewing eight model early intervention programs and finding that "all of the programs were quite effective in fostering positive school placements, significant developmental gains, or both for a substantial

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Indeed, education is the primary treatment for autism.[13]

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percentage of their students"); Tristram Smith et al., *Intensive behavioral treatment for preschoolers with severe mental retardation and pervasive developmental disorder*, 102 AM. J. MENT. RETARD. 238, 238 (1997) (preschool children who received intensive behavioral treatment "made major increases in intellectual, academic, adaptive, and socio-emotional functioning"); *id.* at 246-47 (preschool children who received intensive behavioral treatment scored in the average range on standardized intelligence tests and performed satisfactorily in regular classes several years after the treatment, compared to only 2.5% of autistic children who received minimal treatment); John J. McEachin et al., *Long-term outcome for children with autism who received early intensive behavioral treatment*, 97 AM. J. MENT. RETARD. 359, 367-68 (1993) (autistic children who received early and intensive behavioral intervention prior to age 4 preserved their gains in intellectual and educational functioning at 13, and had average IQ scores which were 30 points higher than that of control subjects); Sandra L. Harris et al., *Changes in cognitive and language functioning of preschool children with autism*, 21 J. AUTISM DEV. DISORD. 281, 287 (1991) (IQ scores of young children increased an average of nearly 19 points after one year of intensive education); Sally J. Rogers and Hal Lewis, *An effective day treatment model for young children with pervasive developmental disorders*, 28 J. AM. ACAD. CHILD & ADOLESC. PSYCHIATRY 207, 207 (1989) (six months of intensive intervention resulted in significant gains "in cognition, perpetual/fine motor, social/emotional, and language skills, which were maintained or increased over a 12- to 18-month treatment"); O. Ivar Lovaas, *Behavioral treatment and normal educational and intellectual functioning in young autistic children*, 55 J. CONSULT. & CLIN. PSYCHOL. 3, 7-9 (1987) (47% of autistic children who received intensive behavioral intervention achieved normal-range IQ scores and successful performance in public schools, compared with only 2% of autistic children who received less intensive intervention); *see generally* Committee on Children With Disabilities, American Academy of Pediatrics, *Technical Report: The Pediatrician's Role in the Diagnosis and Management of Autistic Spectrum Disorder in Children*, 107:5 PEDIATRICS 85 (May 2001), available at http://pediatrics.aappublications.org/cgi/content/full/107/5/e85 (accessed July 17, 2007).

[13] *See* NAT'L RESEARCH COUNCIL, EDUCATING CHILDREN WITH AUTISM 12 (2001) ("Education ... is currently the primary form of treatment in autism."); Green, *supra*, at 29 (besides early, intensive instruction, "[n]o other treatment for autism offers comparable

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But the effectiveness of intervention depends on early application. Leading federal agencies, professional organizations and educational institutions all have stressed the importance of early intervention for children with autism.[14] Congress likewise has emphasized that "children with autism spectrum disorder identified early and enrolled in early intervention programs show significant

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evidence of effectiveness") (citations omitted); Smith & Lovaas, *supra*, at 68 (educational approaches to the treatment of autism have been empirically validated, but biomedical interventions "appear to do little to alter the outcomes of individuals with autism."); Lovaas, *supra* note 12, at 3 ("Medically and psychodynamically oriented therapies have not proven effective in altering outcome.").

[14] *See* NAT'L INST. OF HEALTH, DEP'T OF HEALTH AND HUMAN SERVS., AUTISM SPECTRUM DISORDERS: PERVASIVE DEVELOPMENTAL DISORDERS 17 (2007) ("One point that most professionals agree on is that early intervention is important."), available at http://www.nimh.nih.gov/publicat/nimhautismspectrum.pdf (accessed July 16, 2007); NAT'L INST. OF MENTAL HEALTH, DEP'T OF HEALTH AND HUMAN SERVS., REPORT TO CONGRESS ON AUTISM 2 (2006) ("Early intervention is critical for affected children to gain maximum benefit from current therapies."), available at http://www.nimh.nih.gov/autismiacc/autismreportFY2005.pdf (accessed July 17, 2007); Joicey Hurth et al., *Areas of agreement about effective practices among programs serving young children with autism spectrum disorders*, 12 INFANTS & YOUNG CHILD. 17, 21-26 (1999) (discussing general consensus that "[c]hildren who begin appropriate services earlier have better out-comes" and that the "earliest possible start to intervention" is an integral or defining part of the program); NAT'L RESEARCH COUNCIL, *supra* note 13, at 6 ("The committee recommends that educational services begin as soon as a child is suspected of having an autistic spectrum disorder."); *see generally* American Academy of Pediatrics, *supra* note 12. *See also* Cathryn Garland and Michael O'Hanlon, *Studying Autism Isn't Enough*, N.Y. TIMES (Nov. 21, 2006) ("There is broad consensus, as reflected in previous studies by the National Academy of Sciences and American Academy of Pediatrics, that early and intensive intervention is critical."), available at http://www.nytimes.com/2006/11/21/opinion/21ohanlon.1.html (accessed July 17, 2007).

improvements in their language, cognitive, social, and motor skills, as well as in their future educational attainment and decreased needs for special education services." S. REP. NO. 109-318 at 10. Intervention "should begin as soon as possible, preferably in the preschool years, because young children have not yet fallen as far behind their typically developing peers and may have more neurologic plasticity than older children." Smith & Lovaas, *supra*, at 68-69. During this period "the young, developing brain is very modifiable," Green, *supra*, at 39; and "rigorous behavioral therapy modifies the neural circuitry before the condition becomes permanent." LYNN M. HAMILTON, FACING AUTISM 92 (2000) (citations omitted); *see also* McEachin et al., *supra* note 12, at 371 ("[A]lterations in neurological structure are quite possible as a result of changes in the environment in the first years of life" and "intensive early intervention could compensate for neurological anomalies in such children.").

Children with autism cannot make up for lost time. When the opportunity presented during this window passes, the squandered potential cannot be regained later. "[B]oth popular literature and professional literature offer promises of positive development outcomes, even 'cure' or remediation of autistic symptoms, given early and intensive intervention. Families' desire for best outcomes is heightened by the threat that untreated, or inadequately treated, the syndrome can have devastating developmental impacts." Hurth et al., *supra* note 14, at 18. As the child grows older, he or she will "have a far more difficult time learning the skills that he needs to function in life." *J.H. ex rel. J.D. v. Henrico County Sch. Bd.*, 326 F.3d 560,

565 (4th Cir. 2003).[15] Losing this "valuable and unretrievable time" could mean that the child will "never develop to their full educational achievement level." *Noyes v. Grossmont Union High Sch. Dist.*, 331 F. Supp. 2d 1233, 1243 (S.D. Cal. 2004) (internal citations and quotations omitted), *rev'd sub nom., Evans v. Grossmont Union High Sch. Dist.*, Nos. 04-56341 & 04-56360, 197 Fed. Appx. 648 (9th Cir. Aug. 15, 2006) (reversing attorneys' fees award).

Similarly, gains made through appropriate interventions can be lost or reversed if the child is moved to an inappropriate placement. *See* Green, *supra*, at 30-31 ("One of the keys to producing lasting treatment gains in children with autism is consistency."); American Academy of Pediatrics, *supra* note 12. "Children with autism have a profound ability to regress," and if intensive treatment is not maintained consistently, "you have to go back and reinvent the wheel, not completely, not from the ground up, but you are going to have to go back and basically retool." *J.H. ex rel. J.D. v. Henrico County Sch. Bd.*, 395 F.3d 185, 190 (4th Cir. 2005) (quoting expert testimony). *See also Diatta v. Dist. of Columbia*, 319 F. Supp. 2d 57, 66 (D.D.C. 2004) (because of inappropriate placements, for

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[15] *See also Jaynes v. Newport News Sch. Bd.*, No. 4:99cv146, 2000 U.S. Dist. LEXIS 21684, at *1-2 (E.D. Va. Sept. 7, 2000), *aff'd*, 13 Fed. Appx. 166 (4th Cir. July 10, 2001) (neurologist testimony that "there's a window of opportunity and that window of opportunity is greatest between the age of discovery and as early as possible;" parents should "immediately, immediately do something fast, now, right now"); Anahad O'Connor, *In Autism, New Goal Is Finding It Soon Enough to Fight It*, N.Y. TIMES, Dec. 14, 2004 ("After a certain point, you can still teach an autistic child certain things, ameliorate destructive behaviors, but you're not really going to change the developmental pathway that they're on.") (quotation omitted), available at http://www.nytimes.com/2004/12/14/health/14/auti.html (accessed July 17, 2007).

the "foreseeable future" the child's education would be "remedial, in that educators, aides and his family will have to correct four years of mis-education").

Parents, then, simply cannot allow their child to languish in an inappropriate setting when every passing moment erodes potential benefits that can never be regained. For these children and their parents, "every moment counts." Laurie Tarkan, *Autism Therapy Is Called Effective, but Rare*, N.Y. TIMES, Oct. 22, 2002[16] (describing the "horrible feeling of time slipping away and nothing being done" when parents of children with autism do not have access to appropriate treatment); *see also County Sch. Bd. of Henrico County v. R.T.*, 433 F. Supp. 2d 692, 696 (E.D. Va. 2006) ("a critical window of developmental opportunity was closing" for a child who was not receiving an adequate public education). "Children with autism can't afford to waste a second. . . . With the right kind of early intervention, they can learn. Without it, there's no hope." Leslie C. Feller, *When Autistic Child's Growth Is at Stake*, N.Y. TIMES, Apr. 25, 1999 (internal quotation omitted).[17] Forcing a child with autism into a patently inappropriate placement can have a calamitous and irreparable impact on the long-term development of the child, a circumstance no parent should have to face.

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[16] Available at http://query.nytimes.com/gst/fullpage.html?sec=health&res=9C05E0D71F3DF931A15753C1A9649C8B63 (accessed July 17, 2007).

[17] Available at http://query.nytimes.com/gst/fullpage.html?sec=health&res=9503E2D9143AF936A15757C0A96F958260 (accessed July 17, 2007).

II. MANY PUBLIC SCHOOLS ARE UNABLE TO PROVIDE APPROPRIATE EDUCATIONAL SERVICES TO ALL OF THEIR AUTISTIC STUDENTS

An appropriate placement requires the application of research-based methodologies by specially-trained personnel. This requires both an appropriately-designed program and personnel to implement it – both of which are in short supply all across the nation. The Autism Spectrum Disorder Expert Working Group has found that effective services "tend to be scattered, fragmented, and poorly coordinated. . . . Even where services are available, public and private financing are often inadequate to meet the needs of most individuals with ASD [autism spectrum disorder] and their families." ROADMAP at 3. The Working Group found "a serious and persistent lack of adequate capacity to provide appropriate care for children, adolescents, youth, and adults with ASD." *Id.* at 10. A recent CDC study found that as many as 38% of 8-year-old children with autism spectrum disorders were not receiving special education services in some locations, and that in many locations the majority of children did not receive special education services under the primary category of autism. CDC, *14 Sites Study* at 19.

Even when appropriate programs are available, there often is a lack of qualified personnel to implement the program for all children with autism. Special education teachers are in chronically short supply. Erling E. Boe, *Long-Term Trends in the National Demand, Supply and Shortage of Special Education Teachers*, 40:3 J. SPECIAL EDUC. 138, 138-150 (Sept. 2006); James McLesky et al., *The Supply of, and Demand for, Special Education Teachers*, 38:1 J. SPECIAL EDUC. 5, 5-21 (Mar. 2004). As the National Research Council has observed, "that shortage is

even more serious in the growing field of autistic spectrum disorders." NAT'L RESEARCH COUNCIL, *supra* note 13, at 184; *see also id.* at 186 ("Personnel preparation has become an increasingly well-publicized issue as the number of children identified with autistic spectrum disorders has increased and their special needs have become more evident."). With thousands of children newly diagnosed with autism each year, this shortage is likely to become even more severe. Thus, "[i]t is possible that even a well designed special education program for a school district could still fall short of adequately providing for the special needs of children with autistic spectrum disorders." NAT'L RESEARCH COUNCIL, *supra* note 13, at 182. The National Research Council concluded that "[o]ne of the clear needs in the field of autism is to increase the number of well-prepared professionals to work with children and their families." *Id.* at 190. This is not to say that public schools are incapable of meeting the needs of children with autism; many school systems do have appropriate, adequately-staffed programs. But many do not, and the parents of children living in these districts must look elsewhere to find appropriate services for their children. *See, e.g., A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 681-82 (4th Cir. 2007) (no public school existed that could adequately meet the needs of a child with autism).[18]

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[18] School systems may also deny children with autism a free appropriate public education by failing to recognize a child's disability, *see, e.g., Bd. of Educ. of Montgomery County v. S.G.*, No. 06-1411, 2007 WL 1213213 at *3-4 (4th Cir. Apr. 25, 2007) (*per curiam*) (unpublished); *Scott v. Dist. of Columbia*, No. 03-1672 DAR, 2006 WL 1102839, at *7-9 (D.D.C. Mar. 31, 2006); by failing to formulate an individualized education plan ("IEP") in a timely manner, *Gadsby ex rel. Gadsby v.*

(Continued on following page)

Forcing parents to shoulder the full financial impact of a school district's inability or unwillingness to provide appropriate services would be crushing for most families. The financial burdens of raising a child with autism can be immense. Private service providers can cost up to $50,000 a year or more. THE BROOKINGS INST. AND THE HELP GROUP, CONFERENCE REPORT: AUTISM AND HOPE at 5 (2006).[19] The median income for an American household in 2005, in comparison, was $46,326. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005, at 5 (2006).[20] Services for children with autism are rarely covered by private health insurance, even assuming the parents are insured. ROADMAP at 16; Milt Freudenheim, *Battling Insurers Over Autism Treatment*, N.Y. TIMES, Dec.

Grasmick, 109 F.3d 940, 945 (4th Cir. 1997); *Gabel ex rel. L.G. v. Bd. of Educ. of Hyde Park Cent. Sch. Dist.*, 368 F. Supp. 2d 313, 321 (S.D.N.Y. 2005); *Solomon-Lane v. Dist. of Columbia*, No. 99-2404(RWR), 2005 WL 736533, at *1 (D.D.C. Mar. 31, 2005); *Justin G. ex rel. Gene R. v. Bd. of Educ. of Montgomery County*, 148 F. Supp. 2d 576, 583 (D. Md. 2001); by developing an IEP in such flagrant violation of IDEA's procedural requirements that it amounts to the denial of a free appropriate public education, *see, e.g.*, *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 855-61 (6th Cir. 2004); *W.G. v. Bd. of Trs.*, 960 F.2d 1479, 1481-82, 1484-85 (9th Cir. 1992); *Spielberg v. Henrico County Pub. Sch.*, 853 F.2d 256, 259 (4th Cir. 1988); or by refusing to integrate children with autism into regular education classrooms, where they can address the core deficits of autism: social skills, communication and spontaneity, *see, e.g.*, *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 971-72, 978 (10th Cir. 2004); 20 U.S.C. § 1412(a)(5)(A).

[19] Available at http://www.brookings.edu/dybdocroot/comm/conferencereport/20051216autism.pdf (accessed July 17, 2007).

[20] Available at http://www.census.gov/prod/2006pubs/p60-231.pdf (accessed July 16, 2007).

21, 2004.[21] If both parents work, one parent often goes part-time or quits entirely to devote more time to raising the child – magnifying the financial impact of raising a child with autism. *See, e.g.*, Stephanie Rosenblum, *The Neediest Cases: Putting Their Son, Who Is Autistic, First*, N.Y. TIMES, Jan. 15, 2005;[22] John O'Neil, *One Boy's Journey Out Of Autism's Grasp*, N.Y. TIMES, Dec. 29, 2004.[23] A child with autism is a gift and a joy, but there is no denying that the additional monetary and emotional costs of raising such a child can weigh heavily on the family. NAT'L RESEARCH COUNCIL, *supra* note 13, at 33-35; *see also* Victoria Clayton, *How Families Connect to Cope with Autism*, MSNBC.com, Feb. 24, 2005 ("Besides the anxiety and the high demands on parents' time and energy, autism can also take a heavy toll on family finances and put a big strain on relationships.").[24]

III. CONGRESS DID NOT INTEND TO FORCE PARENTS TO CHOOSE BETWEEN SACRIFICING THEIR CHILD'S DEVELOPMENT OR SACRIFICING THEIR RIGHT TO A FREE PUBLIC EDUCATION

As the Court observed two decades ago, IDEA does not require parents to choose between an appropriate education

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[21] Available at http://www.nytimes.com/2004/12/21/business/21autism.html (accessed July 16, 2007).

[22] Available at http://query.nytimes.com/gst/fullpage.html?res=990DEFDF1538F936A25752C0A9639C8B63 (accessed July 17, 2007).

[23] Available at http://www.nytimes.com/2004/12/29/education/29autism.html (accessed July 17, 2007).

[24] Available at http://www.msnbc.com/id/6988852 (accessed July 16, 2007).

and a free one. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). Especially in light of Congress's repeated recognition that early and appropriate intervention is critical for children with autism, *see supra* pp. 7-8, 13-14; and the broad consensus on the damaging and irreversible consequences of committing a child to an inappropriate placement, *supra* pp. 13-16; IDEA should not be interpreted to force parents faced with an inappropriate placement from the school district to choose between sacrificing their child's development or sacrificing their right to seek reimbursement for proper services.

A. Petitioner's "Give It a Try" Theory Is Inconsistent with IDEA's Statutory Structure and Legislative History

Petitioner and its *amici* contend that a prior-receipt-of-services requirement advances a Congressional decision to encourage parents to give an inappropriate public placement a "try" before rejecting it. Br. for Pet'r at 22, 37; Br. *Amici Curiae* NSBA and AASA at 11. But the legislative history and statutory structure disclose no evidence that Congress intended to adopt a "give it a try" requirement that would force parents to either accept inappropriate placements, or instead sacrifice their rights to reimbursement. To the contrary, Congress has repeatedly demonstrated its appreciation of the critical importance of taking advantage of the developmental window for children with autism through early identification and appropriate intervention. *See* 20 U.S.C. §§ 1401(3)(a)(i), 1462(b)(2)(G), 1463(c)(8)(D); Pub. L. 106-310, Title I, 114 Stat. 1101; Pub. L. 109-416, 120 Stat. 2821 (2006); S. REP. NO. 109-318 at 5, 9-10. Nothing in IDEA requires parents to "try out" an inappropriate IEP before initiating

administrative review proceedings, 20 U.S.C. § 1415(f); or requires a reviewing administrative hearing officer or court to wait until the child has given an inappropriate IEP a try before ruling on the merits and awarding appropriate relief. 20 U.S.C. § 1415(i)(2), (3). Indeed, a hearing officer or court is free to award injunctive relief requiring the school district to offer the child a private placement before the child has tried out the school district's placement. Yet Petitioner and its *amici* offer no rationale for distinguishing between monetary relief and injunctive relief that would have the same effect if the statute truly reflected a "give it a try" requirement.

B. Petitioner's "Give It a Try" Theory Would Lead to Unjust and Irrational Results

In light of the limited availability of appropriately-designed programs for children with autism, the chronic shortage of properly-trained personnel to staff them, *see supra* pp. 17-18; and the ever-growing numbers of newly-diagnosed children, *supra* pp. 6-7; a significant number of families are likely to encounter an inappropriate IEP before their child has received any special education or related services from the school district. On the one hand, these parents could accept the inappropriate services for the time being in order to become eligible for reimbursement if they later secure appropriate services at their own expense – but an inappropriate placement can cause irreparable damage to a child's chances for improvement and prevents the child from taking advantage of the window when the opportunities for progress are the most promising. On the other hand, parents can do what they believe is best for their child by securing appropriate

services at their own personal expense and pursuing their rights in the administrative and judicial review process.

If Petitioner's view of IDEA were accepted, these parents could never be reimbursed for these expenses, even if they prevail on the merits in administrative proceedings and litigation. Instead, they would be forced to shoulder the severe financial impact on their own. *See supra* pp. 19-20. And in many cases, parents would have to continue paying for private services until the school district began providing appropriate services pursuant to an administrative or court order. As the Court has noted, this process can be extraordinarily lengthy. *See Burlington*, 471 U.S. at 370. Parents would be in exactly the position the Court rejected in *Burlington*: winners of an "empty victory" when "a court tell[s] them several years later that they were right but that these expenditures could not in a proper case be reimbursed. . . . [T]he child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete." *Id.* (emphasis in original).

1. Petitioner's "Give It a Try" Theory Would Irrationally Treat Similarly-Situated Parents Differently

Moreover, the prior-receipt-of-services condition for reimbursement proposed by Petitioner would serve its hypothesized "give it a try" policy so poorly that it is simply implausible that Congress had any such policy in mind. An IEP can be inappropriate for any number of reasons having nothing to do with the services a child has received in the past, yet the mere fact that the child received unrelated past services would exempt the parents

from Petitioner's "give it a try" requirement. Petitioner thus would treat similarly-situated parents differently with no rational basis for doing so.

Parents of misdiagnosed children. For example, a child could receive special education and related services for the wrong disability because he or she was misdiagnosed – a serious problem for children with autism, who sometimes are mistaken for being deaf, mentally retarded or emotionally disturbed. *See supra* p. 10. The school district may offer fine services for deaf children, but completely inadequate services for children with autism. Yet, the parents of a child who mistakenly received special education or related services for deafness could reject the inappropriate autism placement and be reimbursed for their personal expenditures on appropriate services, while the parents of a newly-diagnosed child would not.

Parents who move. Or parents may move from one school district where their child received appropriate services for autism to another school district with a different, inappropriate program. The parents who moved could reject the inappropriate placement and retain their eligibility for reimbursement because their child had previously received services under the authority of a public agency – albeit a different public agency – while parents of children who grew up in the district would be subjected to the "give it a try" requirement.

Parents whose children are diagnosed early. Similarly, a school district could have an appropriate program for very young children, but an inadequate program for older children. Parents of children who were diagnosed young enough to take advantage of the early education program would be exempt from the "give it a

try" requirement if they chose to reject the program for older children, yet parents of later-diagnosed children with autism would not. Indeed, not only would parents of the earlier-diagnosed child be exempt from "trying out" the new, inappropriate placement in order to remain eligible for reimbursement if they chose a private placement instead, but they actually could prohibit the school district from seeking to try out the new placement by initiating administrative proceedings and invoking IDEA's "stay put" provision, 20 U.S.C. § 1415(j).

In contrast to Petitioner's treatment of parents who would be eligible for reimbursement, despite the fact that they had never given the particular placement at issue a try, Petitioner would bar parents whose children had never received special education and related services from any school district from reimbursement if they rejected the inappropriate placement, notwithstanding the fact that the parents gave the school the required notice of their intent to enroll their child in private school under 20 U.S.C. § 1412(a)(10)(C)(iii)(I), that the services offered by the school district were inappropriate, that the private school placement was proper, that the expenditures were reasonable, and that the equities weigh in favor of reimbursement. *See Florence County Sch. Dist. v. Carter*, 510 U.S. 7, 12-13, 16 (1997); *Burlington*, 471 U.S. at 370, 374; 20 U.S.C. § 1412(a)(10)(C)(iii)(III).

2. Petitioner's "Give It a Try" Theory Would Bar Reimbursement Even When There Is No Placement to Try

Indeed, Petitioner would deny parents reimbursement even when there is no public placement to "try" – as when the school district does not develop a timely IEP, *see, e.g.*,

Gadsby ex rel. Gadsby v. Grasmick, 109 F.3d 940, 945 & 950 (4th Cir. 1997); *Gabel ex rel. L.G. v. Bd. of Educ. of Hyde Park Cent. Sch. Dist.*, 368 F. Supp. 2d 313, 321-22, 324 (S.D.N.Y. 2005); *Justin G. ex rel. Gene R. v. Bd. Educ. of Montgomery County*, 148 F. Supp. 2d 576, 583-84 (D. Md. 2001); or when the school district fails to recognize the child's disability, *see, e.g., Bd. of Educ. of Montgomery County S.G.*, No. 06-1411, 2007 WL 1213213 at *3-4 (4th Cir. Apr. 25, 2007) (*per curiam*) (unpublished); *Scott v. Dist. of Columbia*, No. 03-1672 DAR, 2006 WL 1102839, at *7-9 (D.D.C. Mar. 31, 2006). In these circumstances, the school district has not offered any special education or related services, yet Petitioner's proposed rule *still* would force parents to bear the full cost of proper services on the Kafkaesque rationale that the school district had never provided any services. Similarly, Petitioner would deny parents reimbursement even where the school district *conceded* that its proposed placement was inappropriate, *see, e.g., Frank G. v. Bd. Educ. Hyde Park*, 459 F.3d 356, 361 (2d Cir. 2006), or if the IEP process was so plagued by procedural deficiencies that no reasonable parent could have faith in the appropriateness of the recommended placement, *see, e.g., Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 855-61 (6th Cir. 2004); *W.G. v. Bd. of Trs.*, 960 F.2d 1479, 1481-1482, 1484-85 (9th Cir. 1992); *Spielberg v. Henrico County Pub. Sch.*, 853 F.2d 256, 259 (4th Cir. 1988).

3. The Statute Does Not Contemplate How Long Parents Would Be Obligated to Try Out an Inappropriate Placement

The irrationality of Petitioner's proposal is further highlighted by the fact that the statute contains absolutely

no provision for how long a child would be required to give an inappropriate placement a try. Must the child try out the school district's inappropriate placement for the entire school year? For a semester? For a day? If one day is enough to satisfy Petitioner's proposed requirement, then the "give it a try" requirement would be absolutely useless for Petitioner's proposed purpose of giving the public placement enough time to show evidence of its success or failure. On the other hand, the longer the time requirement, the more severe and irreversible impact of the inappropriate placement on the parents and the child, as discussed *supra* pp. 13-16.

Even if Petitioner were correct that the statutory language unambiguously supports its interpretation, the consequences of that interpretation are so unjust and irrational that Congress cannot be presumed to have intended them. *Nixon v. Missouri Mun. League*, 541 U.S. 125, 138 (2004); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454 (1989); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989). But as the Brief for Respondent discusses, the statutory language and structure do not mandate or support the construction Petitioner urges. And as explained above, Petitioner's interpretation of the statute is contrary to the statutory structure and legislative history. Indeed, the distinctions that Petitioner's interpretation of IDEA would draw between similarly-situated families so defy rational justification that they would raise serious questions of equal protection, *Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000), and the statute should not be construed to implicate these constitutional concerns. *See Gonzales v. Carhart*, ___ U.S. ___, 127 S. Ct. 1610, 1631 (2007) (citing

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)). Instead, IDEA should be interpreted consistent with its statutory structure and legislative history, and in a manner that avoids the unjust and irrational results that would flow from Petitioner's construction: parents who reject an inappropriate placement from the public school district should be able to seek reimbursement for reasonable expenses incurred securing proper, private services, thus ensuring their rights and their child's rights to an education that is both free and appropriate. *Burlington*, 471 U.S. at 370.

CONCLUSION

For the foregoing reasons, *amicus curiae* Autism Speaks respectfully requests that the Court affirm the judgment of the Court of Appeals for the Second Circuit, and grant such other and further relief as it deems just and proper.

Respectfully submitted,

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No. 06-637

IN THE
SUPREME COURT OF THE UNITED STATES

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F., ON BEHALF OF GILBERT F., A MINOR CHILD,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE*
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES AND NEW JERSEY SPECIAL EDUCATION PRACTITIONERS SUPPORTING RESPONDENT.

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INTERESTS OF AMICI

Amici are organizations of parents of children with disabilities, their families, their attorneys and advocates, their educational consultants, and people with disabilities, listed below.[1]

The Council of Parent Attorneys and Advocates is an independent, nonprofit organization of attorneys, advocates, and parents in 43 states and the District of Columbia who are routinely involved in special education due process hearings throughout the country.

The New Jersey Special Education Practitioners consists of attorney and non-attorney advocates, in private law firms and public interest advocacy organizations, who represent students with disabilities in special education matters. It meets regularly to discuss issues of importance to the practice of special education law, it engages in systemic advocacy on behalf of students with disabilities, and it has extensive experience in special education law.

Petitioner's proposal would require parents of children with disabilities to go through the motions of first attending a public school's proposed placement – even if it is clearly inappropriate – in order to seek tuition reimbursement. Such a requirement risks damaging the education of the child with

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

a disability, by subjecting him or her to an inappropriate education.

Petitioner's proposal, in effect, requires parents to place their child in an inadequate proposed program as a precondition to proving that the proposal is inadequate. The additional requirement that Petitioner seeks to impose will therefore primarily affect cases in which the school district's proposed placement is clearly inadequate, since, in cases where it is a close call whether a school district's proposal would have provided a free appropriate education ("FAPE"), a court may conclude that parents have not met their burden of establishing that FAPE was not provided. *See Schaffer v. Weast*, 546 U.S. 49, 51 (2005).

Those are the very same cases in which parents are most likely not to subject the child to the deleterious consequences of the school's inadequate program.

Petitioner's proposed new requirement would insulate the school district from any consequences for its violations, even in cases in which the school district *agrees* that its proposal did not provide the child with a free appropriate public education. *See Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 361 (2d Cir. 2006). In *Frank G.*, the school district conceded that the special education program it offered to the child with disabilities was not appropriate. Yet, the school district nonetheless asked the courts to deny

reimbursement – effectively leaving the courts with no viable remedy for the school district's admitted violation of IDEA's requirements.[2]

Petitioner's proposed new requirement would create perverse incentives for school districts, which could offer deficient placements to children with disabilities, protected by the knowledge that if the parent simply acts in the child's best interests and declines to subject the child to the deficient program, the courts would be unable to provide a remedy.

SUMMARY OF ARGUMENT

Petitioners' reliance on the *Pennhurst* rule, which requires "clear notice" of the obligations imposed along with federal funding under the Spending Clause, is misplaced. *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1 (1981). *See* Brief of Petitioners at 39-42.

1. Although the application of *Pennhurst* to this case is debatable, as discussed below, the clear notice requirement is in any event easily met. States have had "clear notice" that they could be liable for private school tuition, and the Court need not be concerned that States did not "voluntarily and knowingly accept" the obligation. *Pennhurst*, 451 U.S. at 17.

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[2] Other cases in which a school district has conceded its placement was inappropriate include, for example, *Branham v. Gov't of the Dist. Of Columbia*, 427 F.3d 7, 8 (D.C. Cir. 2005); *C.B.* ex rel. *W.B. v. N.Y. City Dep't of Educ.*, No. 02 CV 4620, 2005 U.S. Dist. LEXIS 15215 at *49-50 (E.D.N.Y. June 10, 2005); *Bd. of Educ. v. Gustafson*, No. 00 Civ. 7870, 2002 U.S. Dist. LEXIS 3271 at *8-9 (S.D.N.Y. Feb. 26, 2002); and *Lester H. v. Carroll*, No. 86-6852, 1989 U.S. Dist. LEXIS 13466 (E.D. Pa. Nov. 9, 1989).

In assessing whether States have "clear notice," this Court has looked to the language in the statute, as well as to the background interpretations in the federal courts and statements of the agency charged with administering the statute. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S.Ct. 2455, 2458 (June 26, 2006); *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 183 (2005).

IDEA expressly gives courts broad authority to order an "appropriate" remedy, 20 U.S.C. § 1415(i)(2)(C)(iii), and this Court long ago held that this section authorizes awards of tuition reimbursement in response to a State's failures to meet its obligation to provide FAPE. *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985). That remedial provision is broadly and clearly stated.

Although Congress amended the statute in 1997, it did not alter the section setting forth the courts' remedial authority, and it said nothing suggesting it intended to overrule *Burlington, Carter*, or the case law in the lower courts. Against that backdrop, no reasonable state would have believed that school districts were no longer subject to reimbursing tuition as a remedy for their violations.

The Secretary of Education, exercising authority delegated by Congress, eliminated any doubt on this point, and expressly notified states following the 1997 amendments to IDEA that school districts remained liable for private school tuition if they failed to provide FAPE, whether or not the child previously received special education services under the authority of the school district.

In the face of the text of the statute, as interpreted in *Burlington* and *Carter*, as well as the clear statement from the Department of Education, no reasonable school district could have believed that Congress had imposed an additional

requirement on parents and that the school districts would no longer be responsible to reimburse tuition if the child had not previously received special education and related services from the school district.

Indeed, the State of New York and New York school districts understood that the available remedies had not changed after the 1997 amendments. New York State's form notice to parents reflected this understanding. That notice expressly advised parents that they could obtain reimbursement for private tuition if the school district did not provide FAPE. This notice, utilized by all school districts in the State, did not notify parents that they were required to enroll the child in the public schools' inadequate educational program prior to seeking reimbursement, consistent with the statements of the U.S. Department of Education, and contrary to Petitioner's assertions in this case.

Moreover, after 1997, New York State's Review Officers – employees of the State Department of Education who review initial decisions of hearing officers – uniformly held that tuition reimbursement remained available, whether or not the child had previously received special education services from the school district. These decisions reflect the State's understanding that the 1997 amendments to IDEA did not overrule *Burlington* and *Carter*.

2. Although the States and school districts had "clear notice," the *Pennhurst* standard ought not be applied to the issue in this case. Congress cannot be expected to enumerate every detail of a Spending Clause program, or to specify in detail each and every aspect of the available remedies. The circumstances under which a court may order a school district to reimburse private school tuition is a question of the appropriate *equitable remedy* for the State's violation of a clearly stated obligation to provide a free appropriate

public education, and as such is not subject to the "clear notice" rule.

In addition, IDEA was enacted not only in the exercise of Congress' Spending Clause authority, but also pursuant to Congress' authority to enforce the Fourteenth Amendment. *See Smith v. Robinson*, 468 U.S. 992 (1984); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). The concerns underpinning *Pennhurst's* "clear notice" rule have less force where, as here, Congress has chosen to provide financial assistance to States in connection with Congress' enforcement of the Fourteenth Amendment. A strict application of *Pennhurst* would undermine Congress' power to exercise its Fourteenth Amendment authority, as well as its power to combine the exercise of that authority with financial support to states pursuant to the Spending Clause. In order to preserve these authorities, the Court should calibrate its application of *Pennhurst* differently from those instances in which Congress is proceeding purely pursuant to the Spending Clause.

ARGUMENT

I. States Have Received Clear Notice That Courts May Order Them to Reimburse Private School Tuition if They Fail to Offer a Free Appropriate Public Education.

In assessing whether States have "clear notice," this Court looks to the language in the statute, as well as to the background interpretations by the federal courts and statements of the agency charged with administering the statute. In this instance, in the face of IDEA's broad remedial authority, this Court's prior case law, and statements from the U.S. Department of Education, no reasonable school district would have believed it was immune from having to reimburse tuition if it violated

IDEA, simply because the parents did not place the child in the inappropriate program.

A. *The Statute Expressly Provides Broad Remedial Authority, and This Court has Confirmed the Authority to Order Tuition Reimbursement.*

Congress clearly notified States of the broad authority for courts to remedy violations of IDEA. The statute expressly and broadly states that the court "shall grant such relief" as it "determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii).

In *Burlington*, 471 U.S. 359, this Court held that, under this provision, parents are entitled to be reimbursed for reasonable costs of a unilateral placement where FAPE is not available in a public school and the parent's placement is ultimately determined to be proper. In reaching this conclusion, the Court noted that the statute

> confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purposes of the Act.

Burlington, 471 U.S. at 369. The Court noted that an injunction directing a school district to develop an appropriate individualized education program ("IEP") is not likely to be effective, Court noted, because a final judicial decision is likely to come "a year or more after the school term covered by that IEP has passed." *Id.* at 370.

The Court has subsequently confirmed this decision in *Carter*, 510 U.S. at 15 (quoting 20 U.S.C. § 1415(e)(2)) ("[O]nce a court holds that the public placement violated IDEA, it is authorized to 'grant such relief as the court

determines is appropriate.'"). This line of authority has stood for over twenty years.

The statutory language, combined with the consistent case law interpreting it as authorizing tuition reimbursement as a remedy for violations, is more than sufficient to establish that States had "clear notice." *See Jackson*, 544 U.S. at 182 (finding that the Board of Education was on notice of its liability based on decisions of the U.S. Supreme Court and federal appellate courts); *see also Arlington*, 126 S.Ct. at 2463 (relying on the Court's prior case law to conclude that States did *not* have clear notice).

B. *The 1997 Amendments to IDEA Did Not Overrule Burlington, and the U.S. Department of Education Advised States and School Districts That They Continued to be Responsible for Tuition Reimbursement if They Failed to Meet Their Obligations*

New York City incorrectly asserts that Congress added a new provision to IDEA in 1997 that effectively overruled *Burlington,* and that those amendments deprived them of "clear notice" that courts could award tuition reimbursements. *See* Brief of Petitioner at 38-41. However, the 1997 amendments must be viewed against the backdrop of this Court's case law and the interpretations of the U.S. Department of Education.

Congress may, of course, overrule or alter the Court's interpretations of statutory language; however, the Court presumes that if Congress "intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *MidAtlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) (citing *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979)).

If Congress had intended to repeal the longstanding interpretation of IDEA reflected in *Burlington*, *Carter*, and the lower court cases, it "likely would have flagged that substantial change." *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 62 (2004). Congress did not indicate any such intent. Congress did not revise the text of § 1415(i)(2)(C)(iii), which remains unchanged from the language this Court interpreted in *Burlington* and *Carter*. Neither the text nor the legislative history of the 1997 amendments mentions any intent to eliminate the Court's ability to order tuition reimbursement in appropriate cases in which a child had not previously received special education and related services from a school district.

Congress also has commanded that IDEA be interpreted in a manner that preserves the rights that children with disabilities had in 1983. Congress directed the Department of Education's regulations to preserve these protections "except to the extent that such regulation reflects the clear and unequivocal intent of Congress in legislation." 20 U.S.C. § 1406(b). In the face of this instruction, and since Congress did not specifically indicate an intent to overrule or narrow *Burlington*, this Court should not presume that Congress intended to do so.

In any event, after the 1997 amendments, the U.S. Department of Education expressly considered and rejected the very argument that New York City makes in this case, and told States seeking federal funding that they could continue to be liable for tuition reimbursement. The Department of Education said:

> [H]earing officers and courts retain their authority recognized in *Burlington* and [*Carter*] to award "appropriate" relief if a public agency has failed to provide FAPE, *including reimbursement and compensatory services*, under section

> 615(l)(2)(B)(iii) *in instances in which the child has not yet received special education and related services.* This authority is independent of their authority under section 612(a)(10)(C)(ii) to award reimbursement for private placements to children who previously were receiving special education and related services from a public agency.

64 Fed. Reg. 12,406, 12,602 (March 12, 1999) (emphasis added).

The Department of Education reiterated this view in a published letter stating that "[w]e do not view 612(a)(10)(C) [20 U.S.C. § 1412(a)(10)(C)] as foreclosing categorically an award of reimbursement in a case in which a child has not yet been enrolled in special education and related services under the authority of a public agency." *See* Letter from the Department of Education to Susan Luger, listed in 65 Fed. Reg. 9178 (Feb. 23, 2000) and quoted in *Application of a Child with a Disability*, Appeal No. 06-021 (Apr. 25, 2006), *available at* http://www.sro.nysed.gov/2006/06-021.htm; *see also Bd. of Educ. of the City Sch. Dist. of N.Y. v. Tom F.*, No. 01 Civ. 6845, 2005 U.S. Dist. LEXIS 49, at *10 (Jan. 4, 2005).

Petitioner simply ignores the Department of Education's interpretation. However, this Court has previously assessed whether States had clear notice based not only on the language of the statute and the interpretations of the courts but also based on the statements of the executive branch agency charged with administering the statute. In *Pennhurst*, this Court observed that the Secretary of Health and Human Services had concluded that "[n]o authority was included in the Act to allow the Department to withhold funds from States on the basis of failure to meet" the enumerated findings that were at issue in that case. 451 U.S. at 23. As this Court said:

> "it strains credulity to argue that participating States should have known of their 'obligations' under Section 6010 when the Secretary of HHS . . . has never understood Section 6010 to impose conditions on participating States."

Id. at 25.

In *Jackson*, 544 U.S. at 182, this Court concluded that grant recipients were on notice of the obligations based in part on the existence of administrative regulations promulgated by the Department of Education in the Title IX context. In *Arlington*, the Court implicitly confirmed that an executive branch agency's statements could provide the required notice. In that case, the Court concluded that a statement by the Government Accountability Office was not relevant to the "clear notice" analysis, in part because it was made "by an agency not responsible for implementing the IDEA." *Arlington*, 126 S.Ct.. at 2463 n.3.

The Court has long recognized that Congress may rely on executive branch agencies to interpret and enforce federal legislation. *See, e.g., Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984). In this instance, Congress charged the U.S. Department of Education with administering and enforcing IDEA. 20 U.S.C. § 1402(a). The Department of Education quite properly concluded that Congress had not "clearly and unequivocally" indicated its intent to eliminate the courts' ability to remedy violations when a child with disabilities had not previously received special education services from the State, 20 U.S.C. § 1406(b), and announced the applicable requirements in the Federal Register for all States and school districts to see.

As a result, New York was fully on notice that the U.S. Department of Education – the executive branch agency to which Congress delegated authority to implement IDEA, and to which this Court defers in reasonable interpretations of federal statutes – has concluded that courts could continue to remedy school districts' violations of IDEA by ordering the district to reimburse private school tuition.

In the face of the statute's broad remedial provision, this Court's case law interpreting that provision, and the explicit statement by the U.S. Department of Education, a reasonable State and school district would have understood that they would be liable for tuition if they failed to provide FAPE.

C. *New York Understood That Parents Were Entitled to Seek Reimbursement if the School Did Not Offer a Free Appropriate Public Education, Without Requiring That the Child First Attend A Public School.*

Although New York City argues that it did not have "clear notice" that it could be ordered to reimburse tuition if it failed to provide a free appropriate public education, in fact both New York State and New York City well understood they would be liable for tuition reimbursement.

1. *Notices to Parents Did Not Describe Any Requirement to Have Previously Received Special Education Services from the School District.*

New York's Department of Education required all New York school districts to tell all parents, without limitation, that they could seek tuition reimbursement if the school district failed to provide a free appropriate public education. Petitioner's current litigation position thus *contradicts* the understanding reflected in the notices it gave to parents.

Since 1997, IDEA has expressly required States to give parents a "full explanation," "written in an easily understandable manner," 20 U.S.C. § 1415(d), of the "requirements for unilateral placement by parents of children in private school at public expense." *Id.* § 1415(d)(2)(H). School districts must give this notice to parents at least annually, as well as at the time they request a due process hearing. This requirement is codified in federal regulations, see 34 C.F.R. § 300.504(a), as well as in New York's state law, see 8 N.Y.C.R.R. § 200.5(f)(4)(viii).

In compliance with this Congressional command, New York's State Education Department has published a form procedural safeguards notice that must be used by all school districts in New York. *See* 8 N.Y.C.R.R. § 200.5(f)(4); *see also id.* § 200.5(f)(1). New York State's form notice has expressly notified *all* parents, without limitation, that they may seek reimbursement for a private placement.

For example, New York State's 1998 notice stated:

> If you place your child in a private school, you are responsible for the cost unless you can prove at an impartial hearing that the school district did not or is unable to provide your child with an appropriate education and that the school you choose is appropriate to meet your child's educational needs.

New York State Education Department Procedural Safeguards Notice, Rights for Parents of Children with Disabilities, Policy 98-10 (November 1998) (relevant portions attached as Appendix A). The notice then set out certain requirements "[i]f you plan to place your child in a private school and have the school district pay." *Id.* The notice advised that the parents must:

> – inform the school district . . . that you are rejecting the placement proposed by the school district, state your concerns and that you will be placing your child at a private school at public expense, *or*
>
> – provide the school district with written notice 10 business days prior to placing your child in the private school. You must provide the information stated above.

Id.

Policy 98-10 post-dates the 1997 amendments to IDEA, and accordingly reflected New York State's understanding of the circumstances in which it might be liable to reimburse tuition. New York's form notice did not advise parents that they could seek reimbursement only if the child previously received special education services through the school district. Nor did it inform parents that in order to seek reimbursement for private school tuition, they must first place the child in the inadequate public school program, the course that New York City now argues is required.

Even today, New York's notice does not advise parents of the requirement that New York City seeks to impose in this litigation. The current notice states:

> If you place your child in a private school because you and the school district disagree that an appropriate program has been made available for your child, *you have the right to request an impartial hearing to seek reimbursement* for the private school placement.

New York State Education Department Procedural Safeguards Notice, Rights for Parents of Children with Disabilities, Ages 3-21 (effective September 13, 2005) (emphasis added), *available at* http://www.vesid.nysed.gov /specialed/publications/policy/prosafenotice/sept05.htm.

This unambiguous statement is followed by a list of requirements and conditions that apply "[i]f you are the parent of a child who previously received a special education program and/or services through the school district and you place your child in a private school." *Id.* (emphasis added). For example, the notice states that reimbursement may be denied if the parents of such children did not give the school district written notice prior to removing the child from the public school. *Id.*

Although the current notice lists these requirements that apply *if* the child previously received special education services from the school district, it nowhere states that prior receipt of special education services from the school district is itself a requirement in order to receive tuition reimbursement. Indeed, any reasonable parent reading the notice would conclude the contrary.[3]

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[3] In addition to demonstrating that New York in fact understood that Courts could order tuition reimbursement, the form notices required to be used by all school districts in New York did not give parents a "full" and "easily understood" explanation specifying the requirement New York City now seeks to impose. *See* 20 U.S.C. § 1415(d). New York City should be estopped from asserting an additional requirement that it did not disclose to parents.

2. *New York State Review Officers Have Consistently Held That School District Continue to be Liable to Reimburse Tuition.*

The New York State Education Department's understanding of the tuition reimbursement remedy is further illustrated by the decisions of the State Review Officers. These Officers are employed by the State Education Department, and provide a state level review of hearing officer decisions before those decisions can be appealed to U.S. District Court. State Review Officers have:

> consistently declined to construe section 1412 of the IDEA as limiting the authority of an impartial hearing officer or state review officer under section 1415 of the IDEA to grant an award of tuition reimbursement to the parents of a child who had not previously received special education or related services under the authority of a public agency.

Application of a Child With a Disability, Appeal No. 06-091 (Oct. 3, 2006), *available at* http://www.sro.nysed.gov/2006/06-091.htm (citing twelve previous decisions extending back to 1998). New York's State Review Officers are aware of and have relied on federal authorities, including *Burlington* and *Carter*. *See, e.g., Application of a Child with a Disability*, 04-022 (June 23, 2004), *available at* http://www.sro.nysed.gov/2004/04-022.htm.

These decisions reflect the State's understanding of the remedial authorities under IDEA as expressed in public decisions available to the New York City public schools.

II. *Pennhurst*'s "Clear Notice" Requirement Should Not Be Mechanically Applied to the Issue in This Case.

A. Reimbursement for Tuition is a Remedy for the State's Failure to Comply with the Mandate to Provide FAPE and *Pennhurst's* Clear Notice Requirement Does Not Apply.

Tuition reimbursement is a remedy for a school district's failure to provide FAPE to a child with disabilities with FAPE, as required by IDEA. In applying *Pennhurst*, this Court has distinguished between provisions outlining the key obligations from those setting forth the remedies for the violations.

> When a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is 'made good' when the recipient compensates the Federal Government or third-party beneficiary . . . for the loss caused by that failure.

Barnes v. Gorman, 536 U.S. 181, 189 (2002) (citations omitted). Additionally,

> a funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant language, but also to those remedies traditionally available in suits for breach of contract.

Id. at 187.

Pennhurst does not require Congress "specifically" to "identify" and "proscrib[e] each condition in [Spending Clause] legislation." *Jackson*, 544 U.S. at 183 (rejecting the contention that *Pennhurst* precluded interpreting Title IX's private cause of action to include retaliation). In particular, *Pennhurst* does not require Congress to delineate all details of the precise circumstances in which a court may order the equitable remedy of tuition reimbursement for IDEA violations. Congress clearly stated the key obligation – to provide a free appropriate public education – and expressly gave the courts broad equitable authority to devise and impose remedies. "[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done," *Bell v. Hood*, 327 U.S. 678, 684 (1946), and the "existence of a statutory right *implies the existence of all necessary and appropriate remedies*," *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) (citations omitted) (emphasis added). Generally,

> absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.

Franklin v. Gwinett Co. Pub. Schools, 503 U.S. 60, 70-71 (1992).

Respondent's request for tuition reimbursement is an appropriate remedy for Petitioner's alleged violation of IDEA, and is not subject to *Pennhurst's* "clear notice" requirement.

B. The Court Should Apply the Pennhurst "Clear Notice" Requirement in a Manner that Supports Congress' Authority to Legislate Pursuant to its Enforcement Authority Under the Fourteenth Amendment.

Although IDEA imposes conditions on States' receipt of federal education funds, it is not enacted purely pursuant to the Spending Clause. Rather, Congress exercised its authority, enumerated in Section 5 of the Fourteenth Amendment to the Constitution, to enact legislation to enforce equal educational opportunity for children with disabilities. This Court has recognized that Congress may use more than one constitutional provision as the source of its legislative authority. *See Fullilove v. Klutzinck*, 448 U.S. 448, 473 (1980) ("In enacting the [Minority Business Enterprise] provision [of the Public Works Employment Act], it is clear that Congress employed an amalgam of its specifically delegated powers," including its spending power and its enforcement power). This Court should apply the *Pennhurst* "clear notice" rule in a manner that recognizes and preserves Congress' enumerated power to legislate pursuant to the Fourteenth Amendment.

1. *Congress Enacted IDEA Utilizing Both Its Fourteenth Amendment and Spending Clause Authorities.*

In addition to recognizing that IDEA was enacted pursuant to Congress' authority under the Spending Clause, *see, e.g., Arlington*, 126 S.Ct.. at 2458, this Court has previously recognized that IDEA was also an exercise of Congress' Fourteenth Amendment authority. The Fourteenth Amendment protects individual rights to equal protection of the law against violation by state actors. Section 5 gives

Congress the power to enforce the provisions of the Amendment.[4]

This Court has previously observed that Congress may employ "an amalgam of its specifically delegated powers," *Fullilove*, 448 U.S. at 473, and may impose conditions in connection with the exercise of its spending authority that are within other legislative authorities. *See, e.g., Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 126 S.Ct.. 1297, 1306 (2006) ("Although Congress has broad authority to legislate on matters of military recruiting, it nonetheless chose to secure campus access for military recruiters indirectly, through its Spending Clause power.").

Congress did so in enacting IDEA and its predecessor, the Education of the Handicapped Act ("EHA"). As the Court observed in *Rowley*, "Congress sought 'to provide assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States to provide equal protection of the laws.'" 458 U.S. at 198 (quoting S. Rep. No. 94-168 at 13 n.22 (1975)). This Court further recognized the Fourteenth Amendment underpinnings of the statute two years later in *Smith*, 468 U.S. at 1009 ("We have little difficulty concluding that Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an *equal protection claim* to a publicly financed special education.") (emphasis added); *see also Arlington*,

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[4] The Fourteenth Amendment provides in relevant part:

> Section 1 . . . No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> *****
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

126 S.Ct.. at 2464 ("IDEA was enacted not only pursuant to Congress' Spending Clause authority, but also pursuant to § 5 of the Fourteenth Amendment.") (Ginsburg, J., concurring). In *Smith*, the Court explained that the EHA was

> an attempt to relieve the fiscal burdens placed on States and localities by their responsibility to provide education for all handicapped children. At the same time, however, *Congress made clear that the EHA is not simply a funding statute. The responsibility for providing the required education remains on the States.* And the Act establishes an enforceable substantive right to a free appropriate public education.

Smith, 468 U.S. at 1010 (citing S. Rep. No. 94-168, at 6 (1975) and *Rowley*, 458 U.S. 176 (1982)) (emphasis added).

Congress' reliance on the Fourteenth Amendment is reflected in the history and text of IDEA. Specifically, Congress found that

> While States, local education agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and *to ensure equal protection of the law.*

20 U.S.C. § 1400(c)(6) (emphasis added); *see also id.* § 1400(c)(7) ("A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an *equal educational opportunity* for all individuals.") (emphasis added).

The legislative history of IDEA also confirms Congress' reliance on the Fourteenth Amendment. Congress was concerned that children with disabilities were not receiving equal educational opportunities. Congress acknowledged that it must

> take a more active role under its responsibility for equal protection of the laws to guarantee that its responsibility for *equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity.*

S. Rep. No. 94-168, at 9 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1433 (emphasis added).

When Congress enacted the statute in 1975, it cited the landmark cases, *Pa. Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972) and *Mills v. Bd. of Educ. of Dist. of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), which applied the Fourteenth Amendment to require the provision of an appropriate public education to children with disabilities. Prior to the enactment of the EHA, one million children with disabilities were entirely excluded from public schools. 150 Cong. Rec. S. 5250, 5326 (daily ed. May 12, 2004) (statement of Sen. Harkin); *see also* 20 U.S.C. § 1400(c)(2)(B); 150 Cong. Rec. S. 5394, 5408 (daily ed. May 13, 2004) (statement of Sen. Bingaman).

Congress enacted the EHA "in order to assure equal protection of the law." Pub. L. No. 94-142, 89 Stat. 775 (1975). At the time it enacted the EHA, Congress noted that

> This Nation has long embraced a philosophy that *the right to a free appropriate public education is basic to equal opportunity* and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue.

S. Rep. No. 94-168, at 9 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1433 (emphasis added).

In discussing the 2004 amendments to IDEA, Senator Bingaman explained that Congress enacted the EHA in response to the use by parents of children with disabilities of the same Fourteenth Amendment equal protection arguments made on behalf of African American children in *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954). *See* 150 Cong. Rec. S. 5394, 5408 (daily ed. May 13, 2004). The EHA was a "comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children." *Smith*, 468 U.S. at 1009. More specifically,

> In 1975, Congress wrote IDEA for two reasons. First, we fleshed out the substance and details of what was required to achieve equality for children with disabilities. Congress specified critical protections for parents and children to transform the constitutional requirement into a practical reality throughout the country . . . A second important purpose of IDEA was to help States meet their *constitutional* obligations.

150 Cong. Rec. S. 5250, 5326 (daily ed. May 12, 2004) (statement of Sen. Harkin) (emphasis added).

Congress sought to protect the constitutional rights of children with disabilities, and this goal was achieved with the enactment of IDEA and its predecessor. Although Congress used its spending power to assist States in funding special education services for children with disabilities, it also had an obligation to "continue to hold our States accountable for educational outcomes of our children." 150 Cong. Rec. S 5394, 5408 (daily ed. May 13, 2004) (statement of Sen. Bingaman).

IDEA is "more than simply an education program; it is one of our Nation's most important civil rights programs." 150 Cong. Rec. S. 5394, 5402 (daily ed. May 13, 2004) (statement of Sen. Daschle). As such, "schools have to provide the services even if Congress doesn't provide the funds." 150 Cong. Rec. S. 5394, 5403 (daily ed. May 13, 2004) (statement of Sen. Daschle).

2. *The Pennhurst "Clear Notice" Rule Should Be Applied in a Way That Preserves Congress' Enumerated Authority Under the Fourteenth Amendment.*

The Court should apply the *Pennhurst* "clear notice" doctrine in a manner that will preserve Congress' ability to exercise its Fourteenth Amendment authority. In *Pennhurst*, the Court noted that legislation enacted pursuant to the enforcement power of the 14th Amendment imposes *involuntary* obligations on states. *Pennhurst*, 451 U.S. at 16. In contrast,

> [u]nlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State *voluntarily and knowingly* accepts the terms of the "contract."

Id. at 17 (emphasis added). Here, Congress chose to use its Spending Clause authority to assist in the enforcement of the Fourteenth Amendment.

The Fourteenth Amendment adds an additional essential "layer" to IDEA that is not present in other pure Spending Clause legislation. The Court should not ignore this very important layer in its consideration of IDEA cases, such as this one, and it should not mechanically apply *Pennhurst* in the same manner as it would in cases where the statute at issue was enacted purely pursuant to the congressional spending power.

Where Congress chooses to provide funding to assist States in meeting the requirements of the Fourteenth Amendment, the rationale for *Pennhurst's* clear notice rule is mitigated. Indeed, if the Court were to apply *Pennhurst* strictly, it would unduly constrain Congress' ability to enforce the Fourteenth Amendment and to provide financial assistance to States to assist them in meeting obligations that could have been imposed on them directly.

CONCLUSION

For the foregoing reasons, amici request that this Court affirm the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated July 18, 2007

APPENDIX A

THE STATE EDUCATION DEPARTMENT/THE UNIVERSITY OF THE STATE OF NEW YORK/ALBANY, NY 122234

Policy 98-10

November 1998

To: District Superintendents
Presidents of Boards of Education
New York City Board of Education
Superintendents of Schools
Superintendents of State-Operated and State-Supported Schools
Superintendents of Special Act Schools
Organizations, Parents & Individuals Concerned with Special Education
Directors of Special Education
Executive Directors of Approved Private Schools
Directors of Pupil Personnel Services
Chairpersons of Committees on Special Education
Chairpersons of Committees on Preschool Special Education
Directors of Approved Preschool Programs and Preschool Educators
NYC – Committee on Preschool Special Education Chairpersons & Administrators
NYC Committee on Special Education Chairpersons
Early Childhood Direction Centers
School Psychologists
Impartial Hearing Officers
New York State Community Dispute Resolution Centers
Commissioner's Advisory Panel for Special Education Services

SETRC Project Directors and Training Specialists
ALTA Project Directors
Independent Living Centers
Colleges with Special Education Teacher Training
Other State Agency Programs

FROM: Rita D. Levay

SUBJECT: Revised Procedural Safeguards Notice (Dated 11/20/98)

The purpose of this memorandum is to provide school districts and other agencies responsible for the education of students with disabilities with the revised mandatory State procedural safeguards notice entitled *New York State Due Process Rights for Parents of Children with Disabilities*. Please note that this notice has been revised as of November 20, 1998 in response to requests from the field to remove the form "Request for Due Process Proceedings" from the "Procedural Safeguards Notice."

This notice includes all new requirements regarding procedural safeguards that are contained in the 1997 amendments to the Individuals with Disabilities Education Act (IDEA) as well as those in Part 200 of the Regulations of the Commissioner of Education. The Federal Corrective Action Plan developed by the Office of Special Education Programs, United States Department of Education, to ensure New York State's compliance with the IDEA requires all school districts to use the attached procedural safeguards notice. All school districts and other agencies responsible for the education of students with disabilities must begin to use this notice by December 31, 1998.

School districts are encouraged to develop their own cover letter to parents to accompany the required notice. School districts may add an addendum of local district policies but may not change the content of the State-mandated procedural safeguards notice. The revised procedural safeguards notice is dated and will be revised, as necessary, by the State Education Department, to reflect changes to Federal and State laws and regulations. For example, the Federal Part 300 Code of Federal Regulations are scheduled to be revised in December 1998 and therefore, New York State's procedural safeguards notice will need to be revised again in January 1999. This notice and updated versions will be available through the Department's web site at: http://www.nysed.gov/vesid/vesid.html.

The procedural safeguards notice **must** be provided to parents, as required by section 1415(d)(1) of IDEA, upon:

- Initial referral for evaluation.
- Each notice of an individualized education program (IEP) meeting.
- Reevaluation of the child.
- Registration of a request for a due process proceeding (mediation of an impartial hearing).
- A decision to remove a child from his/her current educational placement for more than 10 days in a given school year as the result of disciplinary action (20 USC 1415(k)(4)(A).

New York State regulations also require the procedural safeguards notice to be provided to parents when:

- The Committee notifies the parent of its recommendation.

- The recommendation is reviewed by the Board of Education.

If you have questions about this information, please contact your Regional Associate or the Office of Vocational and Educational Services for Individuals with Disabilities, Special Education Policy Unit, at 518-473-2878.

Attachment

New York State Due Process Rights For Parents of Children with Disabilities

YOUR RIGHTS AS A PARENT

You and your school district are vital members of a team that is responsible for developing an appropriate educational program for your child. According to the least restrictive environment (LRE) requirements of Federal and State law and regulation, a student may be removed from the general education environment only when the nature or severity of the disability is such that the student's education cannot be satisfactorily achieved even with the use of supplementary supports and services in the general education setting.

You must be given opportunities for active participation in the discussion and decision making about your child's needs for special education. A full explanation of the process is in *A Parent's Guide to Special Education*. The following information concerns due process rights – your legal rights under Federal and State laws to be involved and make sure that your child receives an appropriate education.

* * * * * *

SECTION 4: PLACING YOUR CHILD IN A PRIVATE SCHOOL

1. You have the right to a free appropriate public education for your child.

2. If you place your child in a private school, you are responsible for the cost unless you can prove at an impartial hearing that the school district did not or is unable to provide your child with an appropriate education and that the school

you choose is appropriate to meet your child's educational needs.

3. If you plan to place your child in a private school and have the school district pay, you must:

- inform the school district at the most recent IEP meeting you attend that you are rejecting the placement proposed by the school district, state your concerns and that you will be placing your child at a private school at public expense, or

- provide the school district with written notice 10 business days prior to placing your child in the private school. You must provide the information stated above.

4. If the school district gave your written notice, prior to your removing your child from public school, that it wants to evaluate your child, you must make your child available for the evaluation. If you refuse to make your child available, any request for tuition reimbursement may be reduced or denied.

5. If you do not inform the school district, make your child available for the evaluation, or if there are other unreasonable actions on your part, an impartial hearing officer or court may reduce or deny the reimbursement of costs of the private school for your child.

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No. 06-637

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,
Petitioner,

v.

TOM F., on behalf of GILBERT F., a minor child,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE COUNCIL OF THE GREAT CITY SCHOOLS AND THE NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE COUNCIL OF THE GREAT CITY SCHOOLS AND THE NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

This brief is submitted on behalf of the Council of the Great City Schools and the National Association of State Directors of Special Education as *amici curiae* in support of Petitioner.[1]

INTEREST OF *AMICI CURIAE*

The Council of the Great City Schools ("Council") is a coalition of 66 of the nation's largest urban public school systems.[2] Founded in 1956 and incorporated in 1961, the Council is located in Washington, D.C., where it promotes urban education through legislation, research, media relations, instruction, management, technology, and other special projects. The Council serves as the national voice for urban educators, providing ways to share promising practices and address common concerns. For the past several years, the Council's legislative and legal staff has participated extensively in congressional consideration of the Individuals with Disabilities Education Act Amendments of 1997, the Individuals with the Disabilities Education Improvement Act of 2004, and the related regulations promulgated by the United States Department of Education. The Council has a strong interest in the outcome of this case as the cost implications for its 66 member school districts would be exorbitant and would negatively impact the districts' ability to serve all of the children enrolled in their public schools.

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[1] Pursuant to Rule 37, blanket letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel contributed monetarily to the brief.

[2] The Council's membership is set forth in the Appendix.

* * *

The National Association of State Directors of Special Education ("NASDSE") is a not-for-profit organization established in 1938 to promote and support education programs and related services for children and youth with disabilities. NASDSE's members include the state directors of special education in all 50 states.[3]

NASDSE's primary mission is to serve students with disabilities by providing services to state educational agencies to facilitate their efforts to maximize educational and functional outcomes for students with disabilities. NASDSE provides important resources to educators that help improve and enhance the quality of special education services and related curricula provided to students with disabilities.

NASDSE has a particular interest in this case because our members are accountable for the proper implementation of the IDEA. We believe that while private school placements are appropriate in some cases, public funding of these placements should be consistent with the plain language of IDEA that proscribes how and under what circumstances such funding should be made available.

INTRODUCTION AND SUMMARY OF ARGUMENT

The statutory provision in this case – 20 U.S.C. § 1412(a)(10)(C)(ii) of the Individuals with Disabilities Education Act ("IDEA") – could not be more clear. Students to whom a free appropriate public education has not been made

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[3] Members also include the directors of special education in the District of Columbia; the Bureau of Indian Education; the Department of Defense Education Agency; the territories of Guam, Puerto Rico, the Virgin Islands, and American Samoa; and the Freely Associated States of Palau, the Marshall Islands, the Federated States of Micronesia and the Commonwealth of the Northern Mariana Islands.

available, and who have been unilaterally placed in private school by their parents, are permitted to seek tuition reimbursement if, *but only if*, they have "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii). This requirement of a bona fide connection between the public special education services ensured by IDEA and the student seeking public funds to finance his education is the only plausible interpretation of the words carefully chosen by Congress. The plain language meaning of the statutory language is also entirely consistent with the underlying purpose of IDEA: to provide students with disabilities a free appropriate *public* education in the least restrictive environment.

Any other interpretation would not only render the relevant subsection superfluous, but would lead to results completely inconsistent with IDEA. Congress and this Court have both made clear that IDEA gives precedence to public schools as the preferred setting for the fulfillment of the statute's mandates. The congressional policy decisions underlying IDEA were aimed at guaranteeing that all students with disabilities would have access to public education, not at creating a program to fund the private education of students with no intention of taking advantage of the public school access ensured by the statute.

School districts face increasingly high costs resulting from private school tuition reimbursement claims, including cases like the instant case where the parents never intended for their child to attend public school at all. The expenditures for private tuition reimbursement divert taxpayer dollars away from public school students and programs. This depletion of funds directly impacts the services that schools are able to provide to the millions of students with disabilities who do receive the public special education and related services that are the cornerstone of IDEA.

Even apart from the fact that the plain language interpretation of the statute requires reversal of the decision below, the Spending Clause independently mandates that the statute not be construed to impose a costly burden on school districts. Spending Clause legislation (such as IDEA) must provide clear notice of the financial burdens it imposes upon the state entities accepting federal funds. Yet here, even the court below deemed the statutory provision ambiguous with respect to the scope of the school districts' reimbursement obligations. Such ambiguity must properly be resolved in favor of the school district.

ARGUMENT

I. A STUDENT WHO IS UNILATERALLY PLACED IN PRIVATE SCHOOL AND WHO HAS NEVER RECEIVED SPECIAL EDUCATION FROM A PUBLIC AGENCY MAY NOT SEEK PRIVATE SCHOOL TUITION REIMBURSEMENT UNDER IDEA.

It is difficult to imagine how Congress could have crafted language that would more clearly and directly answer the precise question that is before the Court. Section 1412(a)(10)(C)(ii) of the Individuals with Disabilities Education Act ("IDEA") directs that a student who has been unilaterally placed by his parents in a private school may bring a claim for private tuition reimbursement only if that student has "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii). This provision balances the need to ensure that school districts are actually given a fair opportunity to provide a free appropriate public education to students with disabilities against the right to seek tuition reimbursement in limited circumstances.

A. IDEA's Overarching Purpose Is To Provide A Free Appropriate *Public* Education In The Least Restrictive Environment.

The fundamental principle of IDEA is its guarantee of a "free appropriate public education" in the "least restrictive environment" for all students with disabilities. 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(5). Congress first made this commitment over thirty years ago in response to a growing realization that American children with disabilities were being substantially underserved by their public school systems. *See* S. Rep. No. 94-168, at 8 (1975) (discussing reasons for enacting IDEA's predecessor and recounting statistics from the Bureau of Education for the Handicapped showing that "of the more than 8 million children . . . with handicapping conditions requiring special education and related services, only 3.9 million such children [were] receiving an appropriate education[,] 1.75 million . . . [were] receiving no educational services at all, and 2.5 million . . . [were] receiving an inappropriate education").

In enacting the Education for All Handicapped Children Act of 1975 ("EHA"), the predecessor to IDEA, Congress expressly recognized that the cost of providing educational services to students with disabilities was the fundamental obstacle facing the public schools. It noted that, although "States have made an effort to comply" with court decisions recognizing educational rights of students with disabilities, a "*lack of financial resources* have prevented the implementation of the various decisions which have been rendered." *Id.* at 7 (emphasis added); *see also id.* at 8 ("Whereas the actions taken at the State and national levels over the past few years have brought substantial progress, the parents of a handicapped child or a handicapped child himself must still too often be told that *adequate funds do not exist* to assure that child the availability of a free appropriate public education.")

(emphasis added). It therefore simultaneously acknowledged the "necessity of an expanded Federal fiscal role," *id.* at 5, and promised the much-needed funds to States that complied with the Act's mandate to provide a free appropriate public education ("FAPE") to all students with disabilities, *id.* at 2, 13 (establishing funding formula).

Congress' decision to focus federal resources on the guarantee of a *public* education was intentional and meaningful.[4] *See, e.g., Cedar Rapids*, 526 U.S. at 78 (in enacting the statute, "Congress intended to open the door of *public* education to all qualified children") (emphasis added) (internal quotation marks omitted). The public schools – both then and now – are ideally situated to educate all students, including those with disabilities, in the most cost-effective way.[5] They also were and are best situated to advance another central goal of IDEA: providing such an education in the "least restrictive environment" ("LRE"), *i.e.*, mainstreaming students with disabilities in the "regular educational environment" to the maximum extent possible, 20 U.S.C. § 1412(a)(5). *See Burlington*, 471 U.S. at 373

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[4] This Court has acknowledged on several occasions the statutory preference for students with disabilities to be educated in the public schools and in the least restrictive environment. *See, e.g., Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 78 (1999); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12 (1993); *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202-03 (1982).

[5] For example, Congress expressly referenced the fact that providing funding for special education services in public schools was more cost-effective than the pre-EHA status quo, which often involved institutionalization rather than provision of public education for students with disabilities. *See* S. Rep. No. 94-168, at 9 (recognizing that "[p]roviding educational services will ensure against persons needlessly being forced into institutional settings" and save billions of dollars expended on such placements).

("Congress was concerned about the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes."); *see also Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 561 (8th Cir. 1996) (stating that IDEA's "strong preference" that students with disabilities be educated in their LRE "gives rise to a presumption in favor of . . . placement in the public schools").[6]

Private schools, by contrast, generally are not as well situated with respect to either of these IDEA goals. Private school tuition for special education students typically far exceeds the public school per-pupil cost. *See, e.g.*, Jay G. Chambers, et al., *What Are We Spending on Special Education Services in the United States, 1999-2000?* 12 (2004) (showing that annual per-pupil special education expenditure for school-aged programs operated within public schools is $5,709 compared to $26,440 for school-aged programs oper-

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[6] Congress enacted the EHA largely in response to a "series of landmark court cases establishing in law the right to education for all handicapped children," S. Rep. No. 94-168, at 6, including *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) ("*PARC*"). *PARC* informed the provisions ultimately found in the Act. S. Rep. No. 94-168, at 6; *see also Rowley*, 458 U.S. at 199 (stating that *PARC* and similar cases "undoubtedly informed" the provisions of the Act). *PARC* stated, *inter alia*, that Pennsylvania had an

> obligation to place each mentally retarded child in a free, *public* program of education and training appropriate to the child's capacity, within the context of a *presumption* that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class, *and placement in a special public school class is preferable to placement in any other type of program of education and training*.

334 F. Supp. at 1260 (emphases added).

ated outside public schools, a figure that includes tuition).[7] And because private schools, unlike public schools, are not open to everyone in a community and consequently do not serve a wide range of students of varying levels of ability, they are less likely to offer opportunities for mainstreaming students with disabilities in the LRE. Instead, as IDEA case law demonstrates, most private schools either serve only mainstream populations of students, or provide only programs for students with specific disabilities. *See, e.g.*, *Winkelman v. Parma City Sch. Dist.*, 411 F. Supp. 2d 722, 732 (N.D. Ohio 2005) (noting that the school district "prefers placing [the student] at [the public school], which focuses on peer interaction," while the parents "prefer placing [the student] at [a private school] which provides almost no opportunity for peer interaction"); *W.C. v. Cobb County Sch. Dist.*, 407 F. Supp. 2d 1351, 1362 (N.D. Ga. 2005) (observing that proposed private school placement was "more restrictive than the placements provided . . . by the School District" and "provided no opportunity for the Plaintiff to receive education with non-disabled peers"); Pet. Br. 14 (discussing educational evaluator's testimony that a "self-contained private school environment" would be too restrictive for Gilbert F., who "should be with non-disabled peers during non-academic activities").

B. The Plain Language Interpretation Of The "Previously Received" Provision Is Consistent With IDEA's Core Purpose.

1. Because the original version of the Act did not explicitly address the issue of private school tuition reimbursement, this Court ultimately was asked to decide whether and

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[7] While this 2004 study compiling data from the 1999-2000 school represents the most recent formal study available, costs have only continued to rise. *See* Part II, *infra*.

to what extent such reimbursement was authorized. With little statutory text to guide its interpretation, the Court concluded that parents *could*, in some instances at least, be reimbursed for private school tuition in unilateral placement cases. *See Burlington*, 471 U.S. at 369. In the absence of any specific statutory provision, the *Burlington* Court grounded its holding in the broad remedial powers IDEA generally vests in the courts. *See id.*

In response to cases such as *Burlington*,[8] Congress amended the statute in 1997 to clarify the parameters of private school tuition reimbursement. These amendments, including the provision at issue here, are part of a comprehensive framework that balances the possibility of private school tuition reimbursement with the core IDEA principles that have animated the Act from the beginning – namely, providing students with disabilities access to the public schools and an entitlement to FAPE in the LRE. Thus, even as the "primary focus of IDEA is and has been the provision of a free appropriate public education . . . within the least restrictive environment . . . for children with disabilities," S. Rep. No. 104-275, at 14 (1996), the 1997 version of the statute included "a number of changes to clarify the responsibility of public school districts to children with disabilities who are placed by their parents in private schools," H.R. Rep. 105-95, at 92 (1997).

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[8] Congress enacted the 1997 amendments in response to a number of cases that arose out of IDEA's lack of specificity regarding the scope of public schools' obligation to provide special education and related services to private school students, including *Burlington* and *Carter* and various decisions of the courts of appeals, particularly *Russman v. Sobol*, 85 F.3d 1050 (2d Cir. 1996), *vacated and remanded sub nom. Bd. of Educ. v. Russman*, 521 U.S. 1114 (1997), and *K.R. v. Anderson Cmty. Sch. Corp.*, 81 F.3d 673 (7th Cir. 1996), *vacated and remanded* 521 U.S. 1114. *See generally* S. Rep. No. 105-17, at 13 (1997); H.R. Rep. 105-95, at 92-93 (1997).

2. The IDEA provision this Court now must interpret is best understood when considered in its full context. At its most general, the 1997 package of amendments reaffirms that tuition reimbursement is disfavored and generally not permitted under IDEA:

> [This subchapter] does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

20 U.S.C. § 1412(a)(10)(C)(i). After setting up this baseline prohibition on private school tuition reimbursement, Congress then expressly provides for three limited circumstances in which public funding for services in private schools or private school tuition reimbursement may be appropriate.

First, when parents unilaterally choose private school,[9] the student may receive services under the "proportionate share" provision, which states that amounts expended on special education and related services by a local educational agency ("LEA") for private school students "shall be equal to a proportionate amount of Federal funds made available under this part." *Id.* § 1412(a)(10)(A)(i)(I). This provision does not create an individual entitlement to any services

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[9] Students may become eligible for services pursuant to the "proportionate share" provision in a variety of ways, including when FAPE has been made available, often because parents choose to send their children to religious schools. *See, e.g., Foley v. Special Sch. Dist.*, 153 F.3d 863, 864 (8th Cir. 1998) (parents seeking services under proportionate share provision stipulated that student had been offered FAPE at public elementary school but had been voluntarily placed in parochial school).

from the LEA. *See* 34 C.F.R. § 300.454(a)(1) ("No private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in public school."). Rather, it "expressly provide[s] that public school agencies are not required to pay the costs of special education services for a particular child; States are required only to spend proportionate amounts on special education services for this class of students as a whole."[10] *Foley*, 153 F.3d at 865.

Second, when the public agency and parents agree that the school district is unable to provide FAPE for the student, the school district will refer the student to private school (or another public school district) at no cost to the parents. 20 U.S.C. § 1412(a)(10)(B). This provision is the operative one in cases where there is an *agreement* by the public school districts that a private school or institution is the appropriate placement, as opposed to cases in which parents choose (or "elect[]") to send the student to private school "without consent of . . . the public agency." *Compare id.* §§ 1412(a)(10)(C)(i), (ii).

Third, and finally, Congress added the provision implicated in this case, which provides that students who are unilaterally placed in private school by their parents (*i.e.*, without agreement by the school district that private school is the appropriate placement) *may* be eligible for tuition reimbursement only if certain criteria are met. Specifically:

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[10] School districts have sole discretion to decide how to use proportionate share funds, including determining what services to provide and where to provide them. *See, e.g.*, *KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1048-49 (9th Cir. 1999) (upholding district's decision to provide equipment to student at his parochial school but to provide vision specialist services at a public building).

> If the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency*, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

Id. § 1412(a)(10)(C)(ii) (emphasis added). The plain language of the provision limits reimbursement to students who have previously received special education services under the authority of a public agency. Moreover, even students who have previously received public special education services may be denied tuition reimbursement, in whole or in part, if the parents (1) fail to inform the student's IEP[11] team that they are rejecting the proposed placement, (2) did not give written notice to the public agency ten days prior to removing the student from public school, (3) did not make the student available for an evaluation, or (4) otherwise acted unreasonably (*i.e.*, "upon a judicial finding of unreasonableness with respect to actions taken by the parents"). *Id.* § 1412(a)(10)(C)(iii).[12]

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[11] An "IEP" is the Individualized Education Program developed by a team of parents, teachers, and school administrators to, among other things, describe the regular education, special education and related services, and other accommodations necessary to provide a student with FAPE. *Id.* § 1414(d).

[12] The legislative history of this provision confirms the plain language. Congress emphasized that it was adding the new requirement that "[p]reviously, the child must have received special education and related

The "previously received" prerequisite to the availability of tuition reimbursement in cases of unilateral placements in private schools was fashioned in direct response to the growing problem of unnecessary diversion of public resources to private schools: "This bill makes it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense, lowering costs to local school districts." 143 Cong. Rec. H2536 (daily ed. May 13, 1997) (statement of Rep. Michael Castle).[13] Notably, once this prerequisite is met, the amendments preserve courts' discretion to determine whether tuition reimbursement is proper under the familiar balancing test used by this Court in *Burlington* and *Carter*. 20 U.S.C. § 1412(a)(10)(C)(ii) (stating that courts or hearing officers "*may* require" reimbursement if a student who previously received services in public school has been unilaterally placed in private school) (emphasis added). In cases where a student "previously received" public special education and related services, courts must still determine whether FAPE has been provided, *see id.*, and whether parents have acted reasonably in unilaterally placing the student in private school, *id.* § 1420(a)(10)(C)(iii).

3. Requiring prior receipt of public special education services is consistent with IDEA's overall goal of opening the

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services under the authority of a public agency." S. Rep. No. 105-17, at 13.

[13] The amendments were both sought and welcomed by the public schools as a necessary cost-saving measure. One national education organization wrote Congress in support of the legislation, explaining that "[s]everal costly requirements have been removed or modified from current law, such as relief in the area of attorneys fees and *reimbursement of unilateral placements* by parents." 143 Cong. Rec. H2531 (daily ed. May 13, 1997) (entered into record by Rep. William F. Goodling, chairman of the House Education and the Workforce Committee) (emphasis added).

door to public education for students with disabilities. *See* Part I.A, *supra*. As they are presumed to do, school districts carry out their responsibilities under IDEA in good faith. *See Schaffer v. Weast*, 546 U.S. 49, 62-63 (2005) (Stevens, J., concurring) ("I believe that we should presume that school officials are properly performing their difficult responsibilities under this important statute.") The unfortunate reality, however, is that public school districts are frequently saddled with tuition reimbursement in cases where it is evident that the student's parents did not enter the IEP process in good faith and never intended to send their child to a public school. *See* Part II.B, *infra*.

The "previously received" provision mandates that, before they may seek private school tuition reimbursement, parents demonstrate that they are acting in good faith by giving public schools a meaningful opportunity to provide FAPE before unilaterally removing their child from public school. The requirement that parents act in good faith and provide schools with this opportunity is further reinforced by § 1412(a)(10)(C)(iii)(III), which provides that even if a student is eligible for private school tuition reimbursement under § 1412(a)(10)(C)(ii), that reimbursement may still be reduced or denied "upon a judicial finding of unreasonableness with respect to actions taken by the parents." 20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3). These requirements prevent abuse by parents who never intended to use the public schools. *See, e.g., Lunn v. Weast*, No. DKC 2005-2363, 2006 WL 1554895, at *7 (D. Md. May 31, 2006) ("The intent is that prior to placing a child in private school, parents must give the public school system an opportunity to provide a FAPE to the child and, where the parent disagrees with the type or level of services provided, to revisit the plan and make adaptations where necessary."); *Balt. City Bd. of Sch. Comm'rs v. Taylorch*, 395 F. Supp. 2d 246, 250 (D. Md.

2005) ("Congress has clearly spoken, and, in order to prevent the FAPE process from being converted to a program for funding private tuition for parents who have demonstrated no commitment to the public school system, it has imposed as a condition for reimbursement the child's initial enrollment in a public school.").

4. Contrary to the lower court's decision, interpreting the statute according to its plain language does not lead to "absurd" results. Compliance with the "previously received" provision in order to obtain tuition reimbursement is not onerous and would require public school placement for only the relatively short period of time necessary to assess the adequacy of the IEP in practice.[14] Everyone, including the hearing officers and courts asked to adjudicate disputes regarding the efficacy of the placement, will benefit from the opportunity to assess the placement in practice, rather than on pa-

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[14] While the statute provides only that the parents must act "reasonably" and does not set forth an express time limit for how long a student must have been enrolled to qualify for tuition reimbursement, other sections of the statute and its implementing regulations provide textual guidelines to aid lower courts in explicating those parameters. *See, e.g.*, 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb) (parents must give public agency 10 days' written notice that they are rejecting the proposed placement and "intend to enroll their child in a private school at public expense"); 34 C.F.R. § 300.508(e) (if parents bring a due process claim against the school district requesting reimbursement, the LEA must respond within 10 days of receipt of the complaint); 20 U.S.C. § 1415(f)(1)(B)(i) (after a complaint is filed, a resolution meeting between the parents and members of the students' IEP team must be held within 15 days); 20 U.S.C. § 1415(f)(1)(B)(ii) (LEA must resolve complaint within 30 days of receipt); 34 C.F.R. §§ 300.510(c), 300.515(a) (if complaint is not resolved, the due process timeline begins and a decision must be reached within the ensuing 45 days). Should a dispute arise over this issue in any given case, the lower courts may look to these timing and procedural provisions to help them determine whether a student has a legitimate claim that he or she has "previously received" services.

per.[15] And as this Court has already concluded, when the preferred public school placement can be resolved within a relatively brief period of time, a short delay in achieving an appropriate IEP in the public setting is both tolerable and preferable to private school tuition reimbursement. *Cf. Burlington*, 471 U.S. at 370 (stating that "[i]f the administrative and judicial review under the Act could be completed in a matter of weeks, rather than years, it would be difficult to imagine a case in which" ordering a public school to develop a new IEP would not be preferable to placement in private school despite the fact the student would have to continue with the existing IEP for a short period while a new one was developed).

Moreover, Congress provided several statutory mechanisms through which parents can attempt to resolve any concerns about the program offered by the public school short of the drastic step of removing their child from the public school system before it has had a chance to provide services. In addition to the required non-adversarial resolution meeting that occurs before the start of any due process hearing, *see* note 13, *supra*, when a dispute regarding the child's placement escalates to the point of requiring formal resolution, IDEA provides parents with a voluntary mediation option that is funded by the state. 20 U.S.C. § 1415(e)(1). IDEA also establishes a separate state complaint process to remedy alleged school district violations of IDEA requirements. 34 C.F.R. § 300.660. If parents opt to file a formal complaint with the state through this procedure, the state

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[15] Common sense dictates that if IEPs are given a chance to work, disputes over reimbursement between parents and school districts will be reduced. As the district court observed in *Lunn*, requiring a student to receive services in a public school for at least some period of time gives the district a meaningful opportunity to revisit IEPs and make adjustments where necessary. 2006 WL 1554895, at *7.

educational agency ("SEA") is required to investigate and resolve the issue within sixty days. *Id.* § 300.661. Similar to the authority of a hearing officer, the SEA may order corrective action to address the child's needs including compensatory education services such as occupational therapy, education beyond the age of twenty-one, and tutoring.[16] The SEA must also address the provision of appropriate future services. *Id.* § 300.151(b).

For all of these reasons, compliance with the "previously received" requirement of §.1412(a)(10)(C)(ii) does not leave parents without options when they believe a proposed placement is inappropriate for their child. Far from leading to absurd results, § 1412(a)(10) represents a reasonable, holistic approach to the provision of special education services in private schools under IDEA, and the "previously received" provision merely ensures that school districts are first given an opportunity to provide those services themselves.

Instead, it is the court of appeals' interpretation that leads to absurd results. That interpretation reads the "previously received" language out of the statute and allows parents to bring claims for private tuition reimbursement under the general provision of IDEA exactly as they could have done

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[16] *See, e.g.*, *Evanston Cmty. Consol. Sch. Dist. No. 65 v. Michael M.*, 356 F.3d 798, 803 (7th Cir. 2004) (affirming award of compensatory services in form of 60 minutes of occupational therapy per week); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 (3d Cir. 1999) ("An award of compensatory education allows a disabled student to continue beyond age twenty-one in order to make up for the earlier deprivation of a free appropriate public education."); *J.C. v. Vacaville Unified Sch. Dist.*, No. S-05-0092 FCD KJM, 2006 WL 2644897, at *7-8 (E.D. Cal. Sept. 14, 2006) (ordering district to pay family who had moved out of the region the fair market value for a private provider to perform the services included in the compensatory education package offered by the district, including one-on-one instruction by a trained assistant and consultation with a behavior analyst).

before the amendment. Such an interpretation is inconsistent with many canons of statutory construction routinely relied upon by this Court. *See, e.g.*, *FCC v. Nextwave Personal Comms. Inc.*, 537 U.S. 293, 307 (2003) (rejecting statutory interpretation that not only "distort[ed] the text of the provision" but "render[ed] the provision superfluous"); *United States v. Wilson*, 503 U.S. 329, 336 (1992) (restating "the familiar maxim that, when Congress alters the words of a statute, it must intend to change the statute's meaning"); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule.").

Finally, as shown in the next Part, adopting Respondent's interpretation of the provision at issue here would have precisely the opposite effect from the one intended by Congress. The legislative history of the 1997 amendments as a whole, and of the "previously received" provision in particular, demonstrates Congress' intent to reduce school districts' costs under IDEA. *See, e.g.*, 143 Cong. Rec. H2536 (statement of Rep. Michael Castle) ("This bill makes it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense, lowering costs to local school districts."); 143 Cong. Rec. H2537 (daily ed. May 13, 1997) (statement of Rep. Buck McKeon) (observing that the 1997 amendments "provide more dollars to the classroom, reduce the costs of litigation, and reduce paperwork and process costs"). Costs to school districts for private school tuition reimbursements resulting from unilateral placements are already high; if the decision of the court of appeals is not reversed, these costs may quickly become exorbitant for school districts nationwide.[17]

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[17] The court of appeals' interpretation of the statute also invites students currently receiving services under the "proportionate share" provision to request IEPs from their districts and then seek tuition reimburse-

II. TUITION REIMBURSEMENT IMPOSES HIGH COSTS ON SCHOOL DISTRICTS AND DIVERTS RESOURCES AWAY FROM SPECIAL EDUCATION IN PUBLIC SCHOOLS.

Public schools have diligently undertaken the great responsibilities with which they have been entrusted by IDEA. For decades, they have scrupulously fulfilled their statutory mandate to provide FAPE to students with disabilities.

However, most public school systems must operate within tightly constrained budgets. IDEA imposes great costs on these school districts, and private school tuition reimbursement claims by students who have never been "previously enrolled" in public school special education programs would dramatically increase these already-high costs. Such claims divert resources from their intended and best use: providing IDEA services to public school students who need and want to receive them.

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ment, claiming they have been denied FAPE. Districts would first be forced to incur huge costs to develop IEPs for these students. *See* Chambers, *supra*, at 14 (during the 1999-2000 school year, districts spent about $6.7 billion on assessment, evaluation, and development of IEPs). On top of this initial burden, districts could then face the high costs of litigating all these claims, despite the likelihood that they would be able to show that the student would be ineligible for reimbursement because the district could provide FAPE. *Id.* at 5 (during the 1999-2000 school year, districts spent approximately $90.2 million on mediation and administrative hearings and $56.3 million on litigation). As shown at note 21, *infra*, districts choose to settle a large percentage of these types of cases because they have neither the monetary nor personnel resources to fully litigate them.

A. Tuition Reimbursement Costs To Individual School Districts Are Already High And Would Only Increase If Respondent's Interpretation Is Adopted.

In one recent school year, public schools spent over 20% of their general operating budgets on special education students. Thomas Parrish et al., Center for Special Education Finance, *State Special Education Finance Systems, 1999-2000: Part II: Special Education Revenues and Expenditures* 22 (2004).[18] A significant portion of these costs are attributable to expenditures for services outside the public schools, including tuition reimbursement. During that same school year, for example, $5.3 billion of the $36 billion spent on special education services for school-aged students funded "students placed in non-public school programs or programs operated by public agencies or institutions other than the public school district . . . includ[ing] tuition" and other expenses. Chambers, *supra*, at 10.

Even more striking is the contrast between the costs associated with public and private special education programs. The average expenditure per school-aged student in public school special education programs was $5,709, while the average special education expenditure per school-aged student in programs operated outside the public schools was $26,440 – nearly five times as much. *See id.* at 12; *see also* Boston

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[18] The total spent to educate all special education students (both preschool and school-aged) was over $78 billion. Parrish, *supra*, at 22. Of this, schools spent approximately $50 billion on special education services, $27.2 billion on regular education services for students with disabilities, and $1 billion on other special needs programs (such as Gifted and Talented education) for students with disabilities. *Id.*; *see also* Chambers, *supra*, at 2 (same). Approximately $36 billion of the $50 billion spent on special education services was spent on school-aged children. Chambers, *supra*, at 10.

Pub. Schs. Tuition Survey (average fiscal year 2006 per-pupil expenditure on special education in public schools was approximately $20,000, while the average per-pupil expenditure on private special education was $54,340).[19]

While the financial impact of private school tuition reimbursement is overwhelming for public school districts in the aggregate, the costs to individual districts of funding special education in private school is even more so. For example, in the 2005-2006 school year, New York City spent over $245 million on agreed-to private school placements, and it has already spent over $228 million on these placements in this academic year. *See* New York City Dep't of Educ. Tuition Survey. New York's total expenditure on students receiving special education in private schools in 2005-2006 was approximately $390 million. *Id.* This year, the city has budgeted almost $824 million to pay for private school education. Alyssa Katz, *The Autism Clause*, N.Y. Mag., Oct. 30, 2006, at 52. Costs are similarly high in other urban districts. *See, e.g.*, Los Angeles Unified Sch. Dist. Tuition Survey (average amount paid for private school tuition for students with disabilities was $14,690 in the 2004-2005 school year and $17,042 in 2005-2006, with total tuition expenditures of approximately $1.5 million in 2004-2005 and of almost $2 million in 2005-2006); Miami-Dade County Pub. Schs. Tuition Survey (amount spent to settle three reimbursement cases in the 2005-2006 school year totaled nearly $200,000).

School district data shows that tuition reimbursement costs are even higher in cases involving students who have been unilaterally placed in private schools by their parents. In New York City, "[t]he cost of claims for unilateral placements in private schools is estimated at over forty million

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[19] All school district tuition data surveys cited herein are on file with the Council of the Great City Schools.

dollars per year." New York City Dep't of Educ. Comments on Regulations for the IDEA, 160 PLI/NY 253, 256 (Sept. 2, 2005) ("New York Comments"); *see also* New York City Dep't of Education Tuition Survey (total spent on unilateral placement cases was over $45 million in 2004-2005 and over $49 million in 2005-2006). In the last three academic years, the average settlement per-pupil paid by New York City in unilateral placement cases was $17,900.57 (2003-2004), $18,551.70 (2004-2005), and $13,716.78 (2005-2006). In Boston, the average tuition reimbursement settlement in such cases was similarly high – $36,885 in the 2004-2005 school year and $21,424 in the 2005-2006 school year. *See* Boston Pub. Schs. Tuition Survey.

These costs will only continue to rise as the cost of private school tuition steadily increases. Costs will rise even more dramatically if the court of appeals' interpretation is adopted, and as the number of for-profit schools providing special education increases. One such school in New York City that provides various types of therapy to developmentally disabled students "enrolls more than 300 and collects $21,821 per student from the city each year," and more and more schools like this are opening. Katz, *supra*, at 52 (discussing the recent opening of several such schools in New York, including one with annual tuition of $26,500, an autism-focused school with annual tuition of $72,500, and another autism-focused school[20] that charges $84,000 per year).

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[20] This school's program has been described as the "gold standard." Katz, *supra*, at 132 (also noting that the supervisor of pediatric psychology at Rusk Institute at the NYU Medical Center observed that the downside of such schools is the "tremendous expense"). Students at this school routinely receive public funding for their tuition, *id.*, despite the fact that IDEA guarantees only an appropriate education, not the best education possible, *see Rowley*, 458 U.S. at 197 (Congress in IDEA did not require schools to provide a "potential-maximizing education"); *Doe v. Bd. of Educ.*, 9 F.3d 455, 459-60 (6th Cir. 1993) (IDEA requires only

Indeed, a student in one of these schools recently brought a reimbursement claim for the 2004-2005 school year seeking more than $230,700 in tuition and related services. *See* New York City Dep't of Educ. Tuition Survey. The founder of some of these schools has stated that he fully expects all parents who enroll their children in his schools to sue the City for tuition reimbursement. *See id.*

The New York City model is unique in that over half of its due process hearing requests involve tuition reimbursement for private unilateral placements, *see* New York Comments, *supra*, at 256, and in almost half of those cases, the child has never attended public school, *see* New York City Dep't of Educ. Tuition Survey (data from 2005-2006 school year). Yet this model could well become the rule rather than the exception if the court of appeals' anomalous interpretation becomes the law of the land. Even if school districts could theoretically win many or most such lawsuits by showing that they could have provided FAPE, the administrative, litigation, and potential settlement costs of these cases are staggering, as New York City's data shows.[21]

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that the district provide "the educational equivalent of a serviceable Chevrolet," not a "Cadillac").

[21] As the New York City experience demonstrates, districts will often agree to settle these cases and pay tuition or some portion of it rather than face litigation. In both the 2004-2005 and 2005-2006 academic years, New York City settled approximately 39% of the requests it received for impartial hearings in unilateral placement cases. *See* New York City Dep't of Educ. Tuition Survey. Total settlement costs in those years were $34,858,635 and $29,910,996, respectively. *Id.* These settlements are most often unrelated to the relative merits of any given case. Rather, they reflect the fact that settlement is often preferable to incurring high litigation costs and is often the only option given that the City has only 15 special education attorneys and one managing attorney to handle the thousands of impartial hearing requests made in unilateral placement cases each year, and relies on a team of only 18 paralegals and one attor-

B. Tuition Reimbursement In Cases Where Parents Never Intended To Use Public Schools Would Further Drain Resources Needed For Public Special Education.

IDEA was intended to provide public education, not to use taxpayer money to fund private education. *See* Part I.A, *supra*. Nevertheless, many parents ask public school districts to develop an IEP for their child despite intending from the outset to reject whatever IEP is developed and then claim that the district is unable to provide FAPE (often without even visiting or evaluating the proposed public school placement). These parents, who never intended to use the public schools, unilaterally place their child in the private school in which they planned to enroll their child all along, and then request reimbursement, hoping for a windfall.[22] *See generally* Cindy L. Skaruppa, et al., *Tuition Reimbursement*

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ney to settle these cases. *Id.* (showing that New York City received approximately 2,244 such requests in 2004-2005 and approximately 2,538 in 2005-2006). Other districts have even fewer attorneys to deal with these cases and would be even more pressed than New York in dealing with increasing numbers of reimbursement claims. Council member districts Chicago Public Schools and The School District of Philadelphia, for example, each employ only 4 lawyers to handle IDEA litigation.

[22] Parents are often prompted to make these requests. Some schools routinely distribute to all prospective parents a folder titled "Reimbursement for Placement Made By Parents in a Private School" that lists "contact information for five lawyers and basic instructions on how to sue the city of New York." Katz, *supra*, at 52. Private education consultants hired by parents to navigate the special education process also often steer their clients to private schools for which reimbursement is then sought. *See generally* Ylan Q. Mui, *For-Hire Advocates Help Parents Traverse System*, Wash. Post, Oct. 5, 2004, at A17. For example, the very policy letter relied upon by the court of appeals was sought by Susan Luger, Pet. App. A-11, an education consultant who has brought 528 reimbursement cases against the Petitioner from July 1, 2002 through May 3, 2007. *See* New York City Dep't of Educ. Tuition Survey.

for Parents' Unilateral Placement of Students in Private Institutions: Justified or Not?, 114 Educ. L. Rep. 353 (1997).

In this case, for example, Respondent requested reimbursement after admitting that he never intended to enroll his child in the proposed placement, had already submitted a down payment to the private school when he requested that the school district evaluate his son, and never visited the proposed public school placement or met with representatives from the school. Pet. Br. 10-11, 14-15. Similar fact patterns are commonplace. *See, e.g.*, *M.M. v. Sch. Bd.*, 437 F.3d 1085, 1090-93 (11th Cir. 2006) (parents participated in IEP process but made clear from the outset that they wanted to continue their child's current private school placement and wanted a particular form of therapy the district did not provide, then proceeded to reject the district's IEP – offering a different but established therapy – and to request reimbursement); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 976 (4th Cir. 1990) (parents presented district with a fully formulated plan of services for their autistic son before even requesting an IEP, rejected the district's proposed IEP, and sought reimbursement when the district agreed to fund only part of the requested plan); *Weast v. Schaffer*, 240 F. Supp. 2d 396, 401 (D. Md. 2002) (observing that ALJ had found "that there was a design by the parents to simply obtain funding from [Montgomery County Public Schools] for a predetermined decision to have the Child attend private school"), *rev'd on other grounds by* 377 F.3d 449 (4th Cir. 2004), *aff'd Schaffer*, 546 U.S. 49 (2005); *Lunn*, 2006 WL 1554895, at *3-4 (parent did not request an IEP until after she had paid a substantial tuition deposit and signed an enrollment contract obligating her to pay over $36,000 even if her child withdrew at any point before or during the school year).

This diversion of public resources toward payment of private school tuition directly impacts educational outcomes

for students who receive special education services in public schools. Every dollar spent on tuition reimbursement is a dollar that can no longer be spent to improve public special education programs.[23] *See* Skaruppa, *supra*, at 357 (observing that funds spent on reimbursement in unilateral placement cases "could be more efficiently and effectively used within the public school setting to educate a greater number of students"). It disproportionately impacts students with the greatest need for public services, namely those whose families cannot afford to seek services outside the public school system.[24] This Court acknowledged that socio-economic

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[23] An example from the attorneys' fees context starkly illustrates the positive educational impact that occurs when previously diverted resources are put back into public school special education programs. When the attorneys' fee cap in IDEA cases was reinstituted in the District of Columbia in fiscal year 2003, public schools there saved $4.4 million. 150 Cong. Rec. S5352 (daily ed. May 12, 2004) (statement of Sen. Hutchison). "Based on those savings, DCPS was able to create 550 new classroom seats at 50 schools during the 2003-2004 school year to serve children with special needs, including children with autism, children who are hearing or vision impaired, mentally retarded, learning disabled or emotionally disabled, and early childhood education students." *Id.*; *see also id.* (noting that savings from the fiscal year 2004 attorneys' fee cap would again be "reinvested into capacity building" and were expected to result in the creation of 450 additional classroom seats).

[24] Private school tuition reimbursement is typically sought by parents who are familiar with the intricacies of IDEA and who have the resources to pay private school tuition out-of-pocket while they are seeking reimbursement. *See* Skaruppa, *supra*, at 354 ("Families of middle and high SES [socio-economic status] choose private programs because they often have money available to educate their children privately and know there is a good chance it will be reimbursed."); *id.* ("Students of low SES parents often do not have the same consideration as their higher SES peers because low income parents do not have the available capital to pay for their child's placement, particularly when they are unaware or uncertain of reimbursement."); Ylan Q. Mui, *For-Hire Advocates Help Parents Traverse System*, Wash. Post, Oct. 5, 2004, at A17 (observing that parents "often spend considerable amounts of money" in hiring educational

reality when it recognized in *Burlington* that "parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so *at their own financial risk*." 471 U.S. at 373-74 (emphasis added). Adoption of the court of appeals' interpretation would only exacerbate this problem, increasing the number of reimbursement cases and thereby diverting still more public resources to private schools – all to the detriment of public school programs, the students and parents who lack the resources to pay for private school, and those who give the public school programs a good-faith chance to succeed.

III. UNDER THE SPENDING CLAUSE, CONGRESS COULD NOT HAVE IMPOSED SUCH A BURDEN WITHOUT PROVIDING CLEAR NOTICE.

As already explained in Part I, the plain language of the Act compels the conclusion that students who have never received services from public schools are not eligible for reimbursement for private school tuition. *See also* Pet. Br. 24-34. But even if the court of appeals were correct that the statutory language confessed to some ambiguity, that conclusion would only confirm the error of its ultimate holding. The Spending Clause independently mandates reversal because the statute provides no clear notice that Congress in-

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consultants to navigate special education rules and place students in "therapeutic schools," and that the average family income of one educational consulting firm's clients "is about $75,000 per year"); *see also, e.g.*, *M.M.*, 437 F.3d at 1090 n.3 (noting that student's mother taught at the private school she attended); *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 152 (1st Cir. 2004) (student's mother was a special education teacher); *Student v. Los Angeles Unified Sch. Dist.*, OAII No. 2005070562, at 1 (Decision dated Mar. 2, 2006) (student represented in tuition reimbursement proceedings by her mother and grandmother, both attorneys).

tended to impose on the states the high costs attendant to the court of appeals' interpretation.[25]

This Court repeatedly has held that when Congress enacts legislation placing conditions on the receipt of federal

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[25] As an initial matter, the Court may consider the Spending Clause argument even though it was not raised below. It is well-settled that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *see also Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 245 n.2 (2000). The core question presented here and litigated below – namely, whether IDEA unambiguously bars tuition reimbursement where a student has never received services from a public school – plainly encompasses the question whether a contrary interpretation is barred by the clear notice requirement of the Spending Clause. Respondent cannot claim to be taken by surprise by the Spending Clause argument as it was raised in the petition for certiorari and is an underlying issue in all IDEA cases raising questions about the scope of districts' funding obligations. *Cf. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001) (exercising discretion to consider argument not made in the court of appeals when the general issue had been raised in the lower courts, "petitioner advanced this particular argument in support of its position on the issue in its petition for certiorari, and the argument was fully briefed on the merits by both parties").

Indeed, this Court decided *Arlington Central* on Spending Clause grounds even though that precise argument had not previously been raised. *Compare Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2463 (2006) (holding that school districts were not required to compensate prevailing parents for expert witness fees because the statute did not provide clear notice of such an obligation as required by the Spending Clause), *with* Resp. Br. in *Arlington Central*, 2006 WL 838890, at *16, *48 (arguing that this Court should not consider the petitioner's Spending Clause arguments because it was not raised below). Thus, there is no bar to the Court's consideration of the issue here, and deferral of the question would only result in inefficiency. *See, e.g., Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (concluding "that the interests of judicial administration [would] be served by addressing the issue [not raised below] on [the] merits" where it had been "squarely presented and fully briefed" and was "an important, recurring issue").

funding pursuant to its Spending Clause power, as it has done here, the intent to impose such conditions must be made unambiguously clear in the text of the statute itself. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."); *see also Rowley*, 458 U.S. at 190 n.11 & 204 n.26. The Court emphasized in *Pennhurst* that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." 451 U.S. at 17. Consistent with basic contract law principles, therefore, the terms of the bargain that Congress asks the States to accept when it imposes conditions on federal funding must be unambiguous – if they are not, the States cannot make a knowing, fully informed decision whether to accept the deal they have been offered. *See id.*

The Court made clear in *Arlington Central* that any inquiry into whether the IDEA is sufficiently clear as to the conditions placed on federal funding under it must be undertaken "from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds." 126 S. Ct. at 2459. Here, the crucial question is "whether such a state official would clearly understand that one of the obligations of the Act" is to reimburse private school tuition for students who never previously received public school special education and related services, despite the clear statutory language to the contrary. *Id.* The answer is plainly no.

As demonstrated in Part I, the plain language of the statute clearly states that reimbursement is *unavailable* in such circumstances. Even if one refused to accept this plain language interpretation and adopted the court of appeals' holding, the "previously received" provision added to the IDEA

as part of the 1997 Amendments would at least render the reimbursement requirements ambiguous. *See Frank G. v. Bd. of Educ.*, 459 F.3d 356, 370 (2d Cir. 2006) (turning to canons of statutory construction because "the terms of" IDEA "are ambiguous"). But ambiguity cannot be condoned in the context of Spending Clause legislation. As discussed above, the costs associated with private school tuition reimbursement are high, *see* Part II, *supra*, and state officials must be afforded clear notice of the full scope of their reimbursement obligations when determining whether to accept conditional federal funding under the IDEA.[26]

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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[26] The magnitude of the costs that would be imposed on school districts under Respondent's interpretation far exceeds that of most cases involving the Spending Clause; the costs potentially imposed under the expert witness fees provision at issue in *Arlington Central*, for example, pale by comparison. While every public school district wants to continue to serve all students, including those with disabilities, costs eventually may become prohibitive. Notably, although Congress originally promised to fund 40% of states' costs of compliance with IDEA, 20 U.S.C. § 1411(a)(2); S. Rep. No. 94-168, at 4, Congress now funds only about 18% of total special education spending. Richard N. Apling, Congressional Research Service, *Individuals with Disabilities Education Act (IDEA): Current Funding Trends* 9 tbl. 5 (Feb. 2005). In this context, where districts already bear the brunt of funding compliance with IDEA, the high additional costs imposed by Respondent's interpretation would weigh heavily in the calculus of whether to accept federal funds.

Respectfully submitted,

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Dated: May 14, 2007

APPENDIX

APPENDIX

Member school districts of the Council of the Great City Schools include Albuquerque Public Schools, Anchorage School District, Atlanta Public Schools, Austin Independent School District, Baltimore City Public Schools, Birmingham City Schools, Boston Public Schools, Broward County Public Schools, Buffalo City School District, Caddo Parish School District, Charleston County Public Schools, Charlotte-Mecklenburg Schools, Chicago Public Schools, Christina School District, Cincinnati Public Schools, Clark County School District, Cleveland Municipal School District, Columbus Public Schools, Dallas Independent School District, Dayton Public Schools, Denver Public Schools, Des Moines Independent Community School District, Detroit Public Schools, District of Columbia Public Schools, Duval County Public Schools, East Baton Rouge Parish School System, Fort Worth Independent School District, Fresno Unified School District, Guilford County Schools, Hillsborough County School District, Houston Independent School District, Indianapolis Public Schools, Jackson Public School District, Jefferson County Public Schools, Kansas City Missouri School District, Long Beach Unified School District, Los Angeles Unified School District, Memphis City Public Schools, Metropolitan Nashville Public Schools, Miami-Dade County Public Schools, Milwaukee Public Schools, Minneapolis Public Schools, New Orleans Public Schools, New York City Department of Education, Newark Public Schools, Norfolk Public Schools, Oakland Unified School District, Oklahoma City Public Schools, Omaha Public Schools, Orange County Public Schools, Palm Beach County Schools, Philadelphia Public Schools, Pittsburgh Public Schools, Portland Public Schools, Providence Public Schools, Richmond Public Schools, Rochester City School District, Sacramento City Unified School District, Salt Lake City School District, San Diego Unified School District, San Francisco Unified School District, Seattle Public Schools, St.

Louis Public Schools, St. Paul Public Schools, Toledo Public Schools, and Wichita Public Schools.

No. 06-637

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,
Petitioner,

v.

TOM F., on behalf of GILBERT F., a minor child,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE INTERNATIONAL DYSLEXIA ASSOCIATION, INC. (IDA), THE NEW YORK BRANCH OF THE IDA, NAMI, MENTAL HEALTH AMERICA, AND THE BAZELON CENTER, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The International Dyslexia Association, Inc., the New York Branch of the International Dyslexia Association, Inc., NAMI (the National Alliance on Mental Illness), Mental Health America, and the Bazelon Center for Mental Health Law respectfully submit this brief as *amici curiae* in support of Respondent. The parties have consented to the filing of this brief.[1]

The International Dyslexia Association (IDA) is the oldest learning disabilities organization in the nation dedicated to helping individuals with dyslexia, their families and the communities that support them. IDA works to meet the organization's mission of providing education, research and advocacy through its 47 branches across the U.S. and Canada and in conjunction with its Global Partners throughout the world. Its goal is to provide a comprehensive forum for parents, educators, and researchers to share experiences, methods, and knowledge. It is also an active advocacy group in matters of public policy or legal concern.

The New York Branch of the International Dyslexia Association (NYB-IDA) is a nonprofit organization that provides public information, referrals, training and support to professionals, families and affected individuals regarding the impact and treatment of people with dyslexia and related learning disorders. It actively advocates for and engages in public educational efforts to promote the teaching of reading through structured multisensory, research-based instruction. Its members are actively engaged in special educational services, including targeted educational intervention and the provision of reasonable accommodations for students with

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel contributed monetarily to this brief.

disabilities at all levels of education and in high-stakes standardized testing.

NAMI (the National Alliance on Mental Illness) is the nation's largest grassroots mental health organization dedicated to improving the lives of children and adults living with mental illnesses and their families. NAMI is a national organization with affiliate organizations in every state and in over 1100 local communities across the country. NAMI works to meet the organization's mission through advocacy, research, support, and education. NAMI advocates for broader school compliance with all of the provisions included in the Individuals with Disabilities Education Act and enforcement of federal special education law to improve the academic and functional performance of students with mental illnesses and related disabilities.

Mental Health America (MHA), formerly the National Mental Health Association, is the country's oldest and largest nonprofit mental health organization. MHA has over 320 affiliates who are dedicated to improving the mental health of all Americans, especially the 54 million people who have severe mental disorders. Through advocacy, education, research, and service, MHA helps to ensure that children with emotional disturbances and adults with mental illnesses are accorded respect, dignity, and the opportunity to achieve their full potential.

The Bazelon Center is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, policy and administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. An important part of the Center's work involves efforts to remedy disability-based discrimination through enforcement of the Individuals with Disabilities Education Act.

SUMMARY OF ARGUMENT

The primary purpose of the Individuals with Disabilities Education Act ("IDEA" or "the Act") is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs [and] to . . . ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1). The goal of a free and appropriate public education ("FAPE") is accomplished under the IDEA through a system in which each child with a disability is entitled to have an individualized education plan ("IEP") that is tailored to address his or her particular circumstances. *See School Comm. of the Town of Burlington v. Dep't of Educ.* ("*Burlington*"), 471 U.S. 359, 368 (1985) (describing an IEP as "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs"). If a school district does not provide FAPE to a child, then the parent is entitled to remove the child from his or her public school and enroll the child in a private school that is able to provide an appropriate education, with the right to seek tuition reimbursement from the school district. *Id.* at 369-70.

In this case, the United States Court of Appeals for the Second Circuit correctly concluded that the central purpose of the IDEA—to provide FAPE to all children with disabilities—is best served by "conferring broad discretion on the district court to grant relief [as] it deems appropriate to parents of disabled children who opt for a unilateral private placement in cases where the parents' placement is determined to be proper and the proposed IEP is determined to be inadequate." *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 371 (2d Cir. 2006) (citing 20 U.S.C. § 1415(i)(2)(C)(iii)), *petition for cert. filed*, 75 U.S.L.W.

3248 (U.S. Oct. 23, 2006) (No. 06-580). Petitioner urged the Second Circuit (as it now urges this Court) to strip district courts of this discretion and to mandate instead that courts condition reimbursement under the IDEA on the child having first given the school district's proposed placement a "try," despite its inappropriateness. Pet'r Br. at 22. Petitioner offers no indication of how long this "try" must last before a child's parents can determine that the placement has failed—an hour, a day, a semester, a year, or even the several years it sometimes takes for exhaustion of the administrative and judicial review process and for the IEP to be declared inadequate. *See Burlington*, 471 U.S. at 361 (describing length of time it takes to review an IEP). But whatever the required length of the "try" envisioned by Petitioner, the IDEA does not, in fact, force parents to make a choice between placing their child in an environment that does not meet that child's needs and forgoing their right to have the public school system pay for an appropriate education.

The Second Circuit properly rejected Petitioner's proposed rule because it would place parents in the "untenable position of acquiescing to an inappropriate placement in order to preserve their right to seek reimbursement from the public agency that devised the inappropriate placement." *Frank G.*, 459 F.3d at 372. The proposed rule also would produce the "absurd result[]" that parents of children whose disabilities are detected early, before the children reach school age, and who receive an inadequate IEP, must nonetheless place their children in public school, knowing that their children will likely fail in that environment, or else forfeit their children's right to a *free* appropriate public education. *See id.* But as the statutory language, legislative history, and this Court's precedents all make clear, "[s]uch a 'first bite' at failure is not required by the IDEA." *Id.*

The adoption of the "fail first" policy advocated by Petitioner would have disastrous consequences for some children with disabilities. Reading skills need to be taught in a child's earliest years, and effective early instruction is often required for a child with a learning disability to learn how to read. Children with mental and emotional disabilities likewise need effective intervention at the earliest possible stage of their development. If children must first endure an inappropriate placement before they can receive the intensive and direct instructional assistance they may require, then there will be children who could learn to read, but do not. This deficiency not only directly harms these children, who inevitably will struggle with failing in school, but also yields societal costs that stem from an increased likelihood that these children will drop out of school and/or end up in the juvenile justice system. Congress enacted the IDEA to prevent these harms, all of which will flow from a decision to adopt Petitioner's rule.

For all of these reasons, this Court should affirm the decision of the United States Court of Appeals for the Second Circuit.

ARGUMENT

I. Private School Tuition Reimbursement May Be Ordered Under The IDEA Even If The Child Has Not First Been Placed In A Public School Setting.

Petitioner is arguing in this case that every child, regardless of the child's circumstances and regardless of the inadequacy of the services offered by the local public school system, *must* be placed in that offered program or forfeit his or her right to a free and appropriation education. In effect, Petitioner asks this Court to impose a "fail first" rule, requiring that children first spend time in a proposed public school placement, even where parents strongly recognize that their children will fail in that placement. That interpretation

of the statute makes little sense in light of the language, structure, and policies of the Act.

A. The Court Has Recognized Parents' Right To Seek Tuition Reimbursement.

In *Burlington*, 471 U.S. at 370, and *Florence County School District v. Carter ex. rel Carter*, 510 U.S. 7 (1993), this Court held that the IDEA empowers courts to order tuition reimbursement as relief for parents who placed their children in private school contrary to an IEP if the court determined that the school district's proposed placement was inadequate and that the private placement was adequate.[2] That interpretation advanced the central purpose of the IDEA, which, like all statutes, must be construed "in conformity with its dominating general purpose" and needs to be read "in the light of context . . . so as to carry out in particular cases the generally expressed legislative policy." *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943). The "dominating general purpose" of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education" and also to "ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1); *see Winkelman ex rel. Winkelman v. Parma City School Dist.*, 127 S. Ct. 1994, 2000 (2007); *Carter*, 510 U.S. at 14. And the IDEA promises that children with disabilities can learn in an environment that "meet[s] their unique needs." 20 U.S.C. § 1400(d)(1).

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[2] *Burlington* and *Carter* relied upon Title 20, United States Code, Section 1415(i)(2), which provides that any party "aggrieved by the findings and decision" rendered in administrative proceedings "shall have the right to bring a civil action with respect to the complaint presented pursuant to this section . . . in any State court of competent jurisdiction or in a district court of the United States . . . ." 20 U.S.C. § 1415(i)(2). The provision further states that the court "shall grant such relief as the court determines is appropriate." *Id.*

Getting children into such an environment at the earliest possible stage of their development is critical to realizing the purpose of the IDEA. As the Court recognized in *Burlington*, time is of the essence in ensuring that children with disabilities receive the services they need. Often, "review of a contested IEP takes years to run its course," which is especially problematic because these are "years critical to the child's development." *Burlington*, 471 U.S. at 361. During these years, parents who disagree with the school district's proposed IEP can either "go along with the IEP to the detriment of their child if it turns out to be inappropriate, or pay for what they consider to be the appropriate placement." *Id.* at 370.[3] The Court in *Burlington* held that if parents choose the latter course, and if they are correct that the IEP was inappropriate and the private school placement turns out to be appropriate, they can be reimbursed for their choice. *See id.* at 372. Indeed, any other result "would be contrary to IDEA's guarantee of 'free appropriate public education.'" *Carter*, 510 U.S. at 12.

But at the same time, as this Court emphasized in *Carter*, parents who choose unilaterally to place their children in private school "'do so at their own financial risk.'" 510 U.S. at 15 (quoting *Burlington*, 471 U.S. at 373-74). They are entitled to reimbursement only if "a federal court concludes *both* that the public placement violated IDEA *and* that the private school placement was proper under the Act." *Id.* (emphasis added). Even then, reimbursement is not guaranteed. Rather, courts "must consider all relevant factors" and "[t]otal reimbursement will not be appropriate if

[3] *Amici* do not mean to suggest, however, that a parent *must* keep a child in a placement in which he or she is failing for years.

the court determines that the cost of the private education was unreasonable."[4] *Id.* at 16.

B. Petitioner's "Fail First" Rule Is Not Consistent With The IDEA.

Seeking to cut back on the rights recognized in *Burlington* and *Carter*, and largely ignoring the overall purposes of the Act, Petitioner argues that Section 1412(a)(10)(C)(ii), a provision added to the IDEA in 1997, "creates a threshold requirement" that "the parent first give the public school's placement a try" in order to keep his or her children eligible for tuition reimbursement under the IDEA.[5] Pet'r Br. at 22. Under this "fail first" rule, many parents could no longer choose to put their family's finances at risk for the sake of their child even when they are "reasonably confident" that a court will later prove them right that the IEP was inadequate. *Burlington*, 471 U.S. at 370. Instead, Petitioner gives them a new choice: forgo your child's right to a *free* appropriate public education, or forgo your child's right to a free *appropriate* public education. Parents with substantial means will undoubtedly choose the former, while parents with lesser means will undoubtedly

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[4] Given that courts must explicitly consider equitable factors in deciding whether reimbursement relief is warranted, the repeated (and unsupported) complaints from Petitioner's *amici* that the Second Circuit's rule will result in parents gaming the public school system are utterly unjustified. *See, e.g.*, Br. of the Council of the Great City Schools et al., at 24-27; Br. of Nat'l School Boards Ass'n et al., at 24-28.

[5] This provision provides that "[i]f the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a [FAPE] available to the child in a timely manner to that enrollment." 20 U.S.C. § 1412(a)(10)(C)(ii).

choose the latter. But the reality is that this is no choice at all, and certainly not a choice that the IDEA contemplated or one that can be reconciled with this Court's prior cases. *See id.* at 372 ("The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.").

The usual tools of statutory interpretation do not support such a counterintuitive reading. To begin with, while the statutory language authorizes tuition reimbursement for parents who unilaterally place in a private setting a child "who previously received special education and related services under the authority of a public agency," 20 U.S.C. § 1412(a)(10)(C)(ii), it does not say that parents are barred from seeking reimbursement when the child has not previously attended a public school. Moreover, such a reading would be in tension with the test that Congress repeatedly set out for determining whether parents should be reimbursed—*i.e.*, whether the public schools had made a free and appropriate public education *available*. First, in Section 1412(a)(10)(C)(i), Congress addressed the situations in which public schools need *not* pay tuition reimbursement, stating that they are protected "if that agency made a free appropriate public education available to the child." Then, in 1412(a)(10)(C)(ii), the section at issue here, Congress reiterated that the issue is not the services actually provided to the child in a pervious public setting but whether "the agency had . . . made a free appropriate public education available to the child in a timely manner prior to [the private school] enrollment." It makes little sense to argue that Congress was limiting reimbursement to children previously placed in public schools, while simultaneously conditioning that right on what was made available (even if never tried).

Moreover, Petitioner asks this Court to read Section 1412(a)(10)(C)(ii) in a way that is divorced entirely from that its surrounding context. To begin with, as *amici* make clear *infra*, Petitioner's interpretation would impede achievement of the Act's central goal, which is to provide a free and appropriate education to every child, including those who have not yet started school.

In addition, Petitioner's reading of this subsection makes no sense in light of the other parts of the same statutory section. Section 1412 elsewhere contains what is commonly referred to as the "child find" provision of the IDEA. This provision requires States to implement policies and procedures to ensure that "[a]ll children with disabilities . . . who are in need of special education and related services, are identified, located, and evaluated." 20 U.S.C. § 1412(a)(3). It also mandates that States ensure that "[c]hildren participating in early-intervention programs . . . experience a smooth and effective transition" to school. *Id.* § 1412(a)(9). Section 1412 further guarantees children procedural safeguards, *see id.* § 1412(a)(6), such as the "stay put" provision of the IDEA, which allows children to stay in their current educational placements while the appropriateness of a new placement is being adjudicated, *see id.* § 1415(j).

Petitioner's reading of Section 1412(a)(10)(C)(ii) would undercut the meaning of these other parts of Section 1412. The "child find" provision is meant to ensure that a child receives appropriate services as quickly as possible. Yet Petitioner's reading would undoubtedly result in unacceptable delays before some children are able to receive the services they need. Moreover, Petitioner's rule undermines the "stay put" provision, which is designed to create stability and continuity for children with disabilities. This stability and continuity will inevitably be disrupted by

forcing parents to enroll their children, even if briefly, in public school to remain eligible for tuition reimbursement.

In short, the Court should reject Petitioner's proposed rule because it conflicts with *Burlington* and looks past the dominant purpose of the IDEA. It would also weaken specific provisions of the IDEA that concern the identification and diagnosis of children with mental, emotional, and learning disabilities and the need for these children to receive a proper placement during the time-consuming process of IDEA litigation. *See Burlington*, 471 U.S. at 370 (describing the review process under the IDEA as "ponderous" and taking as long as "several years").

C. The Petitioner's Proposed Rule Is Inconsistent With The IDEA's Emphasis On Early Intervention.

Apart from its incompatibility with the general statutory purpose behind the IDEA, Petitioner's rule also would undercut the purpose of the 1997 amendments to the IDEA, which were intended to improve early intervention services. The IDEA recognizes, in several different ways, that no time can be lost when providing services to children with disabilities. *See, e.g.*, 20 U.S.C. § 1400(d)(2) (noting that one of the purposes of the Act is to "assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services"); *id.* § 1431(a)(1) (finding that there is an "urgent and substantial need to enhance the development of infants and toddlers with disabilities, to minimize their potential for developmental delay, and to recognize the significant brain development that occurs during a child's first 3 years of life"); *id.* § 1450(11) (finding that "training and information activities assist parents of a child with a disability in dealing with the multiple pressures of parenting such a child and are of particular importance in . . . ensuring the involvement of parents in planning and decisionmaking with respect to early

intervention . . . [and] achieving high quality early intervention, educational, and transitional results for children with disabilities").

In enacting the 1997 amendments to the IDEA, Congress recognized that the early years are the most critical years in serving children with disabilities. *See, e.g.*, H.R. REP. NO. 105-95, at 115 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 113 ("The Committee continues to recognize the importance of early intervention. . . ."); S. REP. NO. 105-17, at 17 (1997) (same). Legislative history reveals that a primary purpose of the 1997 amendments was to provide states with "greater flexibility" to address the needs of children "at risk of having substantial developmental delays if they do not receive early intervention services." H.R. REP. NO. 105-95, at 115, *as reprinted in* 1997 U.S.C.C.A.N. 113. As further described in the House Committee Report, one of the goals of the 1997 amendments was to "[p]romote improved educational results for children with disabilities through early intervention, preschool, and educational experiences that prepare them for later educational challenges and employment." H.R. REP. NO. 105-95, at 82, *as reprinted in* 1997 U.S.C.C.A.N. 79. Indeed, as one Senator pointed out, the IDEA not only "recognizes the need for early intervention," but also "represents one of the very few areas of Federal investment in this critical age group." 143 CONG. REC. S4401-04, S4408 (daily ed. May 14, 1997) (statement of Sen. Kohl); *see id.* ("I am particularly pleased that this legislation will intensify the focus on early intervention services for infants and toddlers with disabilities. As we know from the growing body of scientific evidence on brain development, the most important time to influence a child's learning capacity is in the zero to 3 age range.").

This heavy emphasis on early identification and early intervention only makes sense if it is joined with a

commitment to allow parents and educators to act on the gathered information about a child's disabilities. Section 1412(a)(10)(C)(ii) was added to the IDEA in the 1997 amendments, and yet Petitioner's reading is in considerable tension with the 1997 amendments' strong focus on the need for providing children with appropriate intervention services as quickly as possible. *See* S. REP. NO. 105-17, at 5-6 (stating the 1997 amendments were meant "to assist States in the implementation of early intervention services for infants and toddlers with disabilities and their families and support the smooth and effective transition of these children to preschool"). Many parents will now know before their child begins school that the local school district, despite its best efforts, will be unable to provide a FAPE for their child. This emphasis on early identification and intervention will not lead to the desired results if students with identified mental, emotional, or learning disabilities are then required to "fail first" in a public school in order to remain eligible for private school reimbursement. Petitioner's "fail first" policy will only frustrate the congressional goal of helping children receive assistance at the earliest possible opportunity.

D. Petitioner's Rule Is Also Strongly in Tension With The National Commitment, Embodied In The IDEA, To Effective Literacy Education.

Overall, 6.8 million children in the United States between the ages of four and seventeen have been diagnosed with at least one of the following disorders: attention-deficit-hyperactivity disorder, learning disability, mental retardation, autism, Down's syndrome, or developmental delay. Patricia N. Pastor et al., National Center for Health Statistics, Centers for Disease Control and Prevention, *Parental Reports of Emotional or Behavioral Difficulties and Mental Health Service Use Among U.S. School-Age Children, available at*

http://mentalhealth.samhsa.gov/publications/allpubs/SMA06-4195/ Chapter18.asp (last visited July 13, 2007).

Moreover, during the course of a single school year, approximately twenty percent of children have symptoms of a diagnosable clinical mental health disorder and about five percent have symptoms causing serious functional impairment. *See id.* (citation omitted). "Unfortunately, mental disorders in children are often undetected and therefore remain untreated." *Id.* (citations omitted). Unmet mental health care needs can have serious consequences for children and their families: strained social relationships, poor academic performance, and serious problems in adulthood. *See id.*

Early and effective instruction for all of these children is critical. But *amici* focus herein on the particular issues arising from a delay in proper placement for a child who is learning to read. "Since reading disability is estimated to comprise at least 80 percent of all learning disabilities, we can infer that about 3.5 percent of the school population, or slightly more than 2 million children, are receiving special education services for a reading disability." Sally Shaywitz, OVERCOMING DYSLEXIA: A NEW AND COMPLETE SCIENCE-BASED PROGRAM FOR READING PROBLEMS AT ANY LEVEL 29 (2003); *see also* LD Online, *What is a Learning Disability*, at 1, *available at* http://www.ldonline.org/ldbasics/whatisld (last visited July 13, 2007). And of those children diagnosed with mental retardation, approximately 85% have mild mental retardation and can learn to read with the right intervention. American Psychiatric Ass'n, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV-TR 43 (4th ed. 2000). Thus, the IDEA's focus on reaching children at an early age can also be understood in large part as an effort to help all of these children learn to read.

The importance of teaching all children to read cannot be overstated. It is undisputed that the ability to read is one of the primary tools necessary to succeed in our society. *See* National Research Council, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN 1 (Catherine E. Snow et al. eds., 1998); *see also* Michael Regalado et al., Building Community Systems for Young Children, *Reading and Early Literacy* 1 (2001) ("Few would argue [the point] that literacy achievement is a public policy matter of the highest priority.").

When President Bush introduced the No Child Left Behind Act of 2001 ("NCLB") he described reading as "the most basic educational skill" and posited that "the most basic obligation of any school is to teach reading." *See* Robert W. Sweet, Jr., *The Big Picture: Where We Are Nationally on the Reading Front and How We Got Here, in* THE VOICE OF EVIDENCE IN READING RESEARCH 13, 19 (Peggy McCardle & Vinita Chhabra eds., 2004). This is why one of the fundamental goals of the NCLB is for every child to achieve literacy by the end of third grade. *See* U.S. Dep't of Educ., *Executive Summary of the No Child Left Behind Act of 2001*, *available at* http://www.ed.gov/nclb/overview/intro/execsumm.html (last visited July 2, 2007).

The obvious implicit linkage between the NCLB (with its emphasis on reading skills) and the IDEA (and its early intervention philosophy) was made explicit by President Bush when he signed the Individuals with Disabilities Education Improvement Act on December 3, 2004. President Bush explained that these amendments to the IDEA were meant to "apply[] the reforms of the No Child Left Behind Act to the Individuals with Disabilities Education Improvement Act so schools are accountable for teaching every single child." Statement by President George W. Bush Upon Signing H.R. 1350, 2004 U.S.C.C.A.N. S43, S44 (Dec.

3, 2004). He stated that "[c]hildren with disabilities deserve high hopes, high expectations, and extra help" and that the 2004 IDEA amendments were meant to "ensure[] that students with disabilities will have special education teachers with the skills and training to teach special education and their subject area." *Id.* at S44. He also observed that "[s]ome students with disabilities will need intensive, individualized help." *Id.* Most tellingly, President Bush criticized the practices of the past, when students with disabilities "were too often just shuffled through the system with little expectation that they could make significant progress or succeed like their fellow classmates." *Id.* at S43-S44.

The "fail first" rule proposed by Petitioner will do exactly what President Bush criticized in his signing statement—force students with disabilities to pass through the public schools even if their public school placement is inappropriate and no progress will be made. As *amici* discuss in the next section, any rule that creates a risk of "wasting" the first critical years of a child's education while parents are forced to try out inadequate public settings risks irreparable harm. The IDEA's focus on early and effective instruction is strongly grounded in the empirical understanding that early education is the key, particularly with regard to reading. In short, the IDEA—which has many provisions meant to promote early intervention—should not be construed to require rules that hinder the appropriate placement at an early age that is necessary to teach reading to children with disabilities.

II. The Empirical Research Demonstrates That Placing Children With Disabilities Appropriately From The Beginning Is Critical.

A. Effective Literacy Training At An Early Stage Is Critical.

Children with mental, emotional, and learning disabilities—regardless of how they are classified—face tremendous difficulties in learning to read. *See* Joseph R. Jenkins & Rollanda E. O'Connor, *Early Identification and Intervention for Young Children with Reading/Learning Disabilities*, *in* LEARNING DISABILITIES SUMMIT: BUILDING A FOUNDATION FOR THE FUTURE 1 (Aug. 2001), *available at* http://www.nrcld.org/resources/ldsummit/jenkins.shtml (last visited July 2, 2007). Along with biological deficiencies and/or psychological conditions that hamper a child's intellectual, emotional, and social development, specific learning disorders often result in a failure to learn to read normally. *See* Shaywitz, OVERCOMING DYSLEXIA: A NEW AND COMPLETE SCIENCE-BASED PROGRAM FOR READING PROBLEMS AT ANY LEVEL, at 81 ("As they read, good readers activate the back of the brain and also, to some extent, the front of the brain. In contrast, dyslexic readers show a fault in the system: underactivation of neural pathways in the back of the brain. Consequently, they have initial trouble analyzing words and transforming letters into sounds, and even as they mature, they remain slow and not fluent readers"). When young children with reading difficulties are not provided with the help and support they need at the beginning of their educational careers, they often lose their motivation to learn, have less desire to practice important literacy skills, and consequently, their academic achievement suffers. *See* Marcee M. Steele, *Making the Case for Early Identification and Intervention for Young Children at Risk*

for Learning Disabilities, 32 EARLY CHILDHOOD EDUC. J. 75, 75-76 (2004).

In light of this, the message to parents, teachers, and policy makers is clear: "Children who will probably need additional support for early language and literacy development should receive it as early as possible." National Research Council, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN, at 9. Students who are not learning to read as quickly and easily as their peers generally do not "require qualitatively different instruction ... [i]nstead, they more often need application of the same principles by someone who can apply them expertly to individual children." *Id.* at 12.

Despite the need for special attention at an early age, the National Research Council found that when schools actually intervene to help children who are at the greatest risk for literacy failure, it often does not occur until as late as third grade—or when those children have already fallen behind their peers. *See id.* at 326. Given that the process of learning to read begins at the earliest stages of cognitive development, the National Research Council concluded that "deferring intervention until third or fourth grade should be avoided at all costs." *Id*; *see also* Sheldon H. Horowitz, National Center for Learning Disabilities, *Transition to Kindergarten: Policy Implications for Struggling Learners and Those Who May Be at Risk for Learning Disabilities*, at 12 (2007), *available at* http://www.ncld.org/images/studies/downloads/school-transition-policy-paper.pdf (last visited July 4, 2007) ("[t]he earlier that one intervenes with young children . . . the greater the likelihood of mitigating the potentially negative consequences of these disabilities").

Accordingly, the earlier that intervening services are provided to children with disabilities, the less likely that the impact of the disability will be felt. *See* Committee on

Integrating the Science of Early Childhood Development, FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 78-80 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000). Early intervention correlates with a strong likelihood that students with reading difficulties will establish a foundation from which to improve their literacy skills and thus significantly improve their chances of future academic success. *See, e.g.*, Steele, *Making the Case for Early Identification and Intervention for Young Children at Risk for Learning Disabilities*, at 75-76; G. Reid Lyon & Jack M. Fletcher, *How to Prevent Reading Disabilities*, at 1, 5 (2001), *available at* http://www.hoover.org/publications/ednext/3389276.html (last visited July 3, 2007) ("[e]arly intervention allows ineffectual remedial programs to be replaced with effective prevention").

B. Educators Understand The Costs Of Mistakes In Initial Placements.

It is now undisputed in the educational community that the early intervention approach embodied by the IDEA will particularly help students with reading difficulties. As one commentator has written, "[t]he general question of whether early childhood [intervention] programs can make a difference has been asked and answered in the affirmative innumerable times. This generic inquiry is no longer worthy of further investigation." FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT, at 379.

The emphasis on early intervention in the IDEA partly reflects an awareness that learning to read is a developmental process that begins in infancy and continues throughout childhood. *See* National Research Council, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN, at 43. Research has shown that children must acquire certain skills to become literate students, including (1) phonemic awareness; (2) the

ability to decode unknown words using phonics; (3) the ability to recognize a substantial number of words by sight for fluent reading; (4) the acquisition of a growing vocabulary; and (5) the utilization of reading comprehension techniques. *See* Joseph K. Torgesen, *Lessons Learned from Research on Intervention for Students Who Have Difficulty Learning to Read, in* VOICE OF EVIDENCE IN READING RESEARCH 361-62 (Peggy McCardle & Vinita Chhabra eds., 2004); *see generally* National Reading Panel, *Teaching Children to Read: An Evidence-Based Assessment of the Scientific Research Literature on Reading and Its Implications for Reading Instruction*, at 7-15 (2000).

If children can internalize these skills through comprehensive, consistent, and appropriate instruction from the very beginning of their educational development, they will "rarely stumble later on." *See* National Research Council, STARTING OUT RIGHT: A GUIDE TO PROMOTING CHILDREN'S READING SUCCESSES 145 (1999). However, they will only be able to internalize these skills if they are able to receive an appropriate placement at the earliest possible stage. Waiting years for such a placement—as Petitioner's rule could require—simply will not do.

Research also indicates that while socioeconomic status, a parent's literacy rate, and the child's rate of cognitive development all impact a child's literacy development, one of the most constant and well-known factors in determining whether children will grasp basic literacy skills is the type of learning environment in which they learn these skills. *See, e.g.*, National Research Council, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN, at 313-44; L. Bill Searcy, *Preventing Reading Difficulties Through Early Identification of Children with Special Literacy Needs, in* PEER PROJECT, at 9 (2000). Students placed in classrooms characterized by frequent interruptions, high student to teacher ratios,

unimaginative and repetitive tasks, disinterested or over-worked teachers, and/or an overall poor literacy environment are more likely to have difficulty learning to read—especially if a student has already shown signs of having a disability. Searcy, at 9 (*citing* National Research Council, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN, at 129). Children with emotional disabilities, in particular, need a "structured teaching environment, including the provision of explicit, systematic, and highly interactive direct instruction, delivered in learner-friendly, memorable ways." Mary Wagner et al., *Educating Students with Emotional Disturbances: A National Perspective on School Programs and Services*, 14 J. OF EMOTIONAL & BEHAVIORAL DISORDERS 12, 13 (2006).

Given that the type of classroom environment in which a child receives reading instruction has a definitive impact on literacy, the National Research Council concluded that in order to provide early and effective services for students with reading disabilities, schools must be able to provide these students with smaller class sizes, lower student to teacher ratios, qualified reading specialists, current and age-appropriate instructional materials, and continuous teacher training. *See* National Research Council, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN, at 327. Similarly, Joseph F. Torgesen, a noted researcher in this field, argues that there are four critical elements for establishing effective intervention programs in elementary schools: (1) the right kind and quality of instruction; (2) to be delivered with the right level of intensity and duration; (3) to the right children; (4) at the right time. *See* Joseph K. Torgesen, *Catch Them Before They Fall: Identification and Assessment to Prevent Reading Failure in Young Children, at* 3 (1998), *available at* http://www.ldonline.org/article/225?theme=print (last visited June 30, 2007). Parents who recognize that their children need these types of services

should not be forced to place their children in public schools that are unable to provide such services. Yet that is exactly what will occur if Petitioner prevails.

C. The Costs of Petitioner's Rule Will Far Outweigh The Costs Of Allowing Parents to Choose An Appropriate Private Setting For A Child Entering The Educational System, Where Necessary.

Petitioner and its *amici* devote considerable attention to the costs involved in affirming the decision below. *See, e.g.*, Pet'r Br. at 41 (discussing the "potentially enormous economic impact" of the Second Circuit's holding); Br. of the Council of the Great City Schools et al., at 20-27 (discussing costs). But as this Court has explained, the costs of private tuition reimbursement can be avoided under the IDEA when the school district makes an appropriate placement that will give free and appropriate public education. *See Carter*, 510 U.S. at 15. Moreover, Congress understood when it enacted the IDEA and its 1997 amendments that while providing services to children with disabilities may be costly, there are also enormous individual and societal costs when children do not receive the services they need at the earliest possible age. *See* 20 U.S.C. § 1431(a) (setting forth findings on the "urgent and substantial need" to improve early intervention services and to reduce the "costs to our society, including our Nation's schools, by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age"); H.R. REP. NO. 105-95, at 47 (same)

In other words, providing appropriate services to children at an early age can save money in the future by preventing the need for more intensive—and more expensive—services. *See* H.R. REP. NO. 105-95, at 115, *as reprinted in* 1997 U.S.C.C.A.N., at [illegible] ("infants and toddlers with disabilities whose families receive early intervention services often need

less intensive services when they reach school age."). Indeed, it is fair to say that one of the illuminating principles underlying the Act is that "[i]f we can get young children the services they need early on, we may prevent a need for more drastic intervention later on." 147 CONG. REC. H906-05, H907 (daily ed. March 14, 2001) (statement of Rep. Hooley advocating full funding for the IDEA).

1. The individual costs to the child of failing to provide an appropriate initial placement are high.

Petitioner's *amici* contend that subjecting children to a "try-out" period in a public school placement that parents believe is inappropriate will nonetheless be a positive good because "[e]veryone, including the hearing officers and courts asked to adjudicate disputes regarding the efficacy of the placement, will benefit from the opportunity to assess the placement in practice, rather than on paper." Br. of the Council of the Great City Schools et al., at 15-16. But Petitioner's *amici* fail to recognize that "everyone" does not benefit from a period of inappropriate placement. Notably left out from the list of those who benefit is the child, who would be required to suffer through a placement later deemed inappropriate. Indeed, it is those children who are the subject of this case. Such children will most assuredly not "benefit from the opportunity" and may in fact suffer lasting harm.

These observations are strongly supported by scholarly research demonstrating that while tuition reimbursement may be costly, failing to provide an appropriate initial placement is more costly to children and to society in general. The consequences of failing to attain basic literary skills are significant for children. *See* Torgesen, *Catch Them Before They Fall: Identification and Assessment to Prevent Reading Failure in Young Children*, *available at* http://www.ldonline.org/article/225?theme=print (last visited June 30, 2007). Children who do not develop these core literacy skills will

have "reduced opportunities for vocabulary growth," "missed opportunities for development of reading comprehension strategies," and "less actual practice in reading than other children receive." *Id.* Indeed, failure to achieve competency in these core literacy skills is one of the primary reasons that students are "held back" in school, assigned to special education classes, or provided with other remedial services. *See, e.g.,* Learning First Alliance, *Every Child Reading: An Action Plan of the LEARNING FIRST ALLIANCE*, at 1 (1998), *available at* http://www.learningfirst.org/publications/reading (last visited July 1, 2007.). It is also well established that "[c]hildren who are poor readers at the end of first grade almost never acquire average-level reading skills by the end of elementary school." Joseph K. Torgesen, *Preventing Early Reading Failure—and its Devastating Downward Spiral: The Evidence for Early Intervention*, AMERICAN EDUCATOR (Fall 2004), *at* http://www.aft.org/pubs-reports/american_educator/issues/fall04/reading.htm, at 1 (last visited July 17, 2007) (citing several longitudinal studies supporting this conclusion).

Because every child is unique, it is impossible to provide a standardized learning curriculum that will adequately meet the literacy needs of all students. However, there are basic skills that all students must be taught in order to become proficient readers as they transition from kindergarten through third grade. *See* National Research Council, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN, at 79-84. For example, learning to read in kindergarten and first grade is generally defined by a child's grasp of phonological skills, or the ability to "know their letters," hear and distinguish individual letter sounds, and match letter sounds to printed text. *Id.* at 80-81. Upon completion of second grade, students should be able to comprehend grade-appropriate fiction and non-fiction text and "[s]how evidence of [an] expanding language repertory." *Id.* at 82. Finally, by

third grade, students should be able to use "letter-sound correspondence knowledge and structural analysis to decode words," discuss themes and messages in grade-appropriate text, and read aloud with fluency and comprehension. *Id.* at 83. Failing to succeed at any of these levels, however, will inevitably cause students to fall behind in their academic achievement. *See id.* at 4. As such, early intervention for students in need of reading assistance is critical to preventing the problems that plague students who did not acquire these core literacy skills at the same rates as their peers.

The failure to learn to read may also lead to additional learning disorders or psychological conditions that will further hamper the child's intellectual, emotional, and social development. Such a child may suffer multiple years of early failure since early schooling is centered around reading skills. Indeed, research shows that by the end of first grade, children struggling to read begin to feel less positive about themselves. *See Learning Disabilities and Early Intervention Strategies: How to Reform the Special Education Referral and Identification Process: Hearing Before the H. Subcomm. on Educ. Reform of the H. Comm. of Educ. and the Workforce*, 107th Cong., at 68 (2002) (statement of Robert Pasternack, former Assistant Sec'y of Special Educ. & Rehab. Servs., U.S. Dep't of Educ.) [Hereinafter, *Hearing*]. By the third grade, these students will often resist efforts to learn because "they no longer have the motivation [not] to look stupid." *Id.* at 33 (statement of G. Reid Lyon, Research Psychologist and Chief of Child Development and Behavior Branch, National Institute of Child Health and Human Development). From that point on, as students are introduced to content from social science, history, and literature, their inability to read will effectively hamper the remainder of their education. *See id.* Such children will likely experience further decline in self-esteem and motivation, conclude they will never learn at the rate of

other students, and withdraw into isolation. *See id.* at 68 (statement of Mr. Pasternack).

Accordingly, failing to properly support students requiring an individualized educational plan may cause mental, emotional, or learning disabilities to snowball. University of Michigan Health Systems, *What are Learning Disabilities (LD)?*, *at* http://www.med.umich.edu/1libr/yourchild/ld.htm (last visited July 17, 2007). Though it is difficult to distill a definitive theory of causation from the coexistence of certain learning disorders, the scientific literature on comorbidities suggests that failing to properly treat developmental disorders increases the likelihood that other learning disorders will emerge. It is well-documented that comorbidity of developmental disorders tends to be the rule, and not the exception. *See generally* Deborah Dewey, *Comorbidity of Developmental Disorders*, *available at* http://play.psych.mun.ca/~dhart/clinical/newsletter/comorbidity.html (last visited July 17, 2007). For example, the general link between attention-deficit/hyperactivity disorder and learning disorders is well-established. *See generally* Jeanette Wasserstein & Martha Denkla, *Learning Disabilities and Attention Deficit/Hyperactivity Disorder in Adults: Overlap with Executive Functioning*, *in* ATTENTION-DEFICIT DISORDERS AND COMORBIDITIES IN CHILDREN, ADOLESCENTS, AND ADULTS (Thomas Brown ed., forthcoming 2008). Thus, to the extent that schools are failing to properly place and educate children with mental, emotional, and learning disorders, there seems to be a natural risk of making those disorders worse while also contributing to related psychological disorders.

Moreover, the law is replete with compelling anecdotes that illustrate how the failure to properly address a child's learning disorders may exacerbate whatever learning disabilities previously existed, and therefore stymie that

child's overall educational progress. For example, consider Alex Keita, an autistic child whose parents successfully challenged the IEP developed by his school district. *See Diatta v. District of Columbia*, 319 F. Supp. 2d 57 (D.D.C. 2004). Experts found that the school district's failure to recommend the right kind of placement had "exacerbated Alex's condition and interfering behaviors; that Alex had made no progress in the last three years; and that the longer that Alex [was] denied an appropriate education program the worse his behaviors [would] become, increasing the likelihood that he [would] need to be placed at a residential treatment facility." *Id.* at 60. The court concurred that Alex's condition had been "exacerbated" by the school's district's failure to make a proper placement and lamented about the degree of damage that had been done. *Id.* at 67. It concluded that "[f]or the foreseeable future the majority of Alex's education will be remedial, in that educators, aides and his family will have to correct four years of mis-education before Alex is fully brought up to speed and operating at an educational level commensurate with his age and abilities as a disabled child." *Id.* at 66.

In short, the costs to children in failing to provide them with an appropriate initial placement are simply too high.

2. The societal costs of failing to provide an appropriate initial placement are high.

The indirect costs of failure, in turn, are major. These costs may not be borne exclusively by the school districts, but they will surely be borne by society as a whole. Beyond the harm caused to the lives of the individual children who are made to endure an inappropriate placement that persists while the legal process under the IDEA plays out, broader societal costs are also inherent in a regime that makes children wait for the educational support that they need.

For example, inappropriate placement for children with disabilities may be related to an increased risk of school dropout. *See* National Council on Disability, *The Well Being of Our Nation: An Inter-Generational Vision of Effective Mental Health Services and Supports* 18-19, 28 (Sept. 16, 2002), *available at* http://www.ncd.gov/newsroom/publications/2002/pdf/mentalhealth.pdf [hereinafter *Well Being*]. Indeed, the dropout rate for children with learning disabilities is nearly forty percent, which is 1.5 times the national average. *See* American Psychiatric Ass'n, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV-TR 50 (4th ed. 2000). When a child's disabilities are not appropriately treated, he or she is more likely to fail, become ashamed or frustrated, and end up teased or ostracized by others. As this occurs, the child's behavior will often deteriorate, making each school day a "cruel test" and leading the child to hate school, and possibly drop out altogether. Stanley J. Antonoff, *Juvenile Justice, Dyslexia, and Other Learning Disabilities*, *in* THE SECOND CONFERENCE ON JUVENILE JUSTICE, DYSLEXIA AND OTHER LEARNING DISABILITIES 9 (Stanley J. Antonoff ed., 2000); *see also Hearing* at 7, 68. Though these tendencies may arguably exist whether or not a disability is properly treated, inappropriate treatment exacerbates the risks.

The implications of inappropriate placement also extend well beyond the affected individuals and raise distinct policy concerns related to the social costs of inappropriate placement. In particular, the failure to provide an appropriate education to children with disabilities may "contribute to avoidable behaviors that result in delinquency or an increased likelihood of referral to the juvenile justice system." National Council on Disability, *Addressing the Needs of Youth with Disabilities in the Juvenile Justice System: The Current Status of Evidence-Based Research* 26 (May 1, 2003), *available at* http://www.ncd.gov/newsroom/

publications/pdf/juvenille.pdf. Indeed, though the issue of causation is complicated, studies have consistently found that the rate of mental and emotional disabilities is higher among the juvenile justice population than among the general population. *See Addressing the Needs*, at 15; *Well Being*, at 30; Sue Burrell & Loren Warboys, Office of Juvenile Justice and Delinquency Prevention, *Special Education and the Juvenile Justice System* (2000), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/179359.pdf [hereinafter Burrell & Warboys, *Special Education*]; U.S. Dep't of Educ., *Twenty-First Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* II-2 (1999).

Among the possible explanations, one that is commonly cited is the "school failure theory," in which a student's experience of his or her disability may be the source of difficulties, frustration, and failure in school, which in turn may lead to criminal behavior. *Addressing the Needs*, at 55; *Well Being*, at 32-33. This possibility is amplified when schools fail to provide the required services under the IDEA; in such instances, the child may instead be treated or labeled as a "discipline problem" and, hence, create a self-fulfilling prophecy. *Well Being*, at 28, 32; Antonoff, *Juvenile Justice, Dyslexia, and Other Learning Disabilities in* THE SECOND CONFERENCE ON JUVENILE JUSTICE, DYSLEXIA AND OTHER LEARNING DISABILITIES 4–5. In sum, without appropriate intervention, students whose behavior and disabilities ought to be addressed in school sometimes find their needs being addressed through the juvenile justice system instead. *See Well Being*, at 32-33. Conversely, ensuring that disability-related needs are appropriately treated through proper educational services may play a significant role in reducing juvenile delinquency. *See generally* Burrell & Warboys, *Special Education*. But one of the keys is assuring an

appropriate *early* education in an appropriate *initial* placement.

CONCLUSION

For the reasons stated above, *amici* urge this Court to affirm the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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In The
Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner

v.

TOM F., ON BEHALF OF GILBERT F., A MINOR CHILD

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE NATIONAL DISABILITY RIGHTS NETWORK AND THE NEW YORK LAWYERS FOR THE PUBLIC INTEREST AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

This case is of particular interest to *amici curiae*, who advocate on behalf of children with disabilities to ensure that they receive the free appropriate education they are guaranteed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

Amicus National Disability Rights Network (NDRN), formerly the National Association of Protection and Advocacy Systems, is the membership association of protection and advocacy (P&A) agencies that are located in all 50 States, the District of Columbia, Puerto Rico, and the territories. P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. In fiscal year 2006, P&As served more than 74,000 persons with disabilities through individual case representation and systemic advocacy.

The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. P&A lawyers often represent or assist parents of children with disabilities in the impartial due process hearings authorized under the IDEA and know first-hand that often school districts do not provide appropriate special education and related services, forcing parents to make unilateral placement decisions.

Amicus New York Lawyers for the Public Interest (NYLPI) is one of New York's federally-funded P&A agencies. Founded in 1976 as a partnership between the public and private bars to assist disadvantaged and underrepresented people in New York City, NYLPI

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[1] Letters from the parties consenting to the filing of *amicus curiae* briefs have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

conducts advocacy and litigation concerning disability rights, access to health care, and environmental justice. Through its Disability Law Center, NYLPI has a long history of advocacy for children with disabilities on educational issues. NYLPI filed an *amicus* brief in the court of appeals in this case urging that court to reverse the judgment of the district court.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, requires that a State that accepts federal IDEA funds (and its school districts) provide to each child with a disability a free appropriate education tailored to accommodate the child's disability and to achieve educational benefit. If a school district violates this statutory mandate, a court may, after exhaustion of administrative procedures, "grant such relief as the court determines is appropriate" for violations of the statute. 20 U.S.C. § 1415(i)(2)(C)(iii). This broad grant of remedial authority has twice been interpreted by this Court to authorize a court order to a school district to reimburse parents for their reasonable expenditures on private special education for a child if the court ultimately determines that such placement, rather than the school district's proposal, is proper under the IDEA. *See School Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993). Congress has not repealed that equitable authority.

A. 1. Contrary to the overstated rhetoric of petitioner and its *amici*, a ruling in favor of the parent in this case should not impose a significant burden on school districts. Fewer than 1.5% of children with disabilities have been placed in private school over the past two decades, in order to receive an appropriate special education and related services. Most of those children are placed in private schools with the consent of the public school district and do not implicate the reimbursement remedy at issue in this case. Unilateral placement of

children with disabilities in private schools by their parents because of a public school's failure to offer the appropriate education required by federal law constitutes some very small part of that already narrow slice of children in private placements.

2. The popular press repeatedly quotes disgruntled school officials describing private placements as an epidemic of the "greedy needy" – wealthy parents "gaming the system." The claim is that parents seek reimbursement for private school settings for children with trivial disabilities (sometimes implying that perhaps the children are not experiencing a disability at all but merely seeking an advantage) and for amounts of money far in excess of what would be spent in public school. But this claim is not supported by real data. To the contrary, the facts demonstrate that the IDEA benefits predominantly lower-income children with disabilities, that the children who are most likely to be placed in private schools are those with less common disabilities, and that the cost of private placement is not significantly greater and, in places like New York City, can actually be less than that spent in public school.

3. Petitioner and its *amici* gloss over the fact that the decisions by hearing officers and judges to reimburse parents of children with disabilities placed in private school are based on findings that public school systems did not comply with the IDEA because they did not offer an appropriate education for the children. Compliance and monitoring reports by the United States Department of Education have revealed that in many localities, school districts are not in compliance with federal law. The myriad of cases in which federal and state courts have made similar findings confirms this fact. New York reflects this national reality. New York has been out of compliance with various of the IDEA's requirements for decades.

B. The equitable authority of courts to order reimbursement for those relatively few children who must be placed in private school in order to receive the free

appropriate education provided by the IDEA has not been curtailed by Congress.

1. In *Burlington* and again in *Carter*, this Court held that the IDEA authorizes courts to order reimbursement of reasonable private school tuition if a school district is not offering an education appropriate for a child with disabilities. Contrary to petitioner's argument, 20 U.S.C. § 1412(a)(10)(C), first enacted in 1997, did not create a new categorical limitation on the remedies available for violations of the IDEA. This Court had relied in those leading opinions on two statutory provisions to determine that courts can award tuition reimbursement and Congress has not altered either of them (save for changes in terminology).

2. The IDEA does not include the clear statement that would be necessary for Congress to restrict the remedial authority of courts. If Congress wishes to divest courts of their broad equitable authority, Congress must do so by a "clear and valid legislative command." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001). A statute that merely identifies particular equitable remedies that can be awarded does not constitute the necessary clear statement to divest courts of their general authority to award other equitable remedies. *See Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960).

3. Other basic tools of statutory construction confirm that petitioner's reading of the statute cannot be sustained.

First, reading the statute as petitioner suggests could lead to absurd results. For example, it would apparently deny reimbursement to a child with a disability if the child "received" *no* special education and related services, even if the school district acknowledged in an IEP that the child should be receiving such education and services, while it would permit reimbursement if the child had received *some* special education and related services but enrolled in a private placement that could provide the child *all* the

appropriate education and services. Second, it would encourage parents to place a child with a disability in a placement they believe to be unreasonable and potentially harmful simply to have shown that they "tried it out." Their child with a disability, in the mean time, will lose the educational value of that time – an educational opportunity that cannot be recouped and which may create even further learning difficulties for the child.

Nothing in the legislative history suggests that Congress intended this result or sought to eliminate the equitable authority of courts to provide relief for children who never received special education under the authority of a public agency if the parents can establish that the school district is not offering an appropriate education. To the contrary, to the extent this issue was discussed at all, the legislative history confirms that Section 1412(a)(10)(C) was intended to codify the prevailing case law that notice to the school district of an intent to place a child in private school because of dissatisfaction with the proposed IEP is a relevant factor for a court to consider in exercising its remedial discretion.

ARGUMENT

SECTION 1412(a)(10)(C) OF THE IDEA DOES NOT RESTRICT JUDICIAL AUTHORITY TO AWARD REIMBURSEMENT FOR NEEDED PRIVATE SCHOOL PLACEMENT WHEN A CHILD DID NOT PREVIOUSLY RECEIVE SPECIAL EDUCATION UNDER THE AUTHORITY OF A PUBLIC AGENCY

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, "creates a right, enforceable in federal court, to the free appropriate public education required by the statute." *Smith v. Robinson*, 468 U.S. 992, 1002 n.6 (1984). The IDEA requires that a State that accepts federal IDEA funds (and its school districts) provide each child with a disability with a free appropriate education tailored to accommodate the child's disabilities

and to achieve educational benefit. *See Board of Educ. v. Rowley*, 458 U.S. 176, 209 (1982).[2]

If a school district violates this statutory mandate, a court may, after exhaustion of administrative procedures, "grant such relief as the court determines is appropriate" for violations of the statute. 20 U.S.C. § 1415(i)(2)(C)(iii). This broad grant of remedial authority has twice been interpreted by this Court to authorize a court order to school districts to reimburse parents for their reasonable expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP with a public school placement, is proper under the Act. *See School Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993).

Contrary to petitioner's argument, 20 U.S.C. § 1412(a)(10)(C), first enacted in 1997, did not impose a categorical limitation on the remedies available for violations of the IDEA. Rather, Section 1412(a)(10)(C) identifies factors that a court "may" consider in exercising its remedial discretion in a particular category of cases in which a child who "previously received special education and related services under the authority of a public agency" has been denied the federal right to a free appropriate education and the parents, in the interim, have placed the child in private school.

Congress intended this provision to clarify the nature of the notice and cooperation obligations that parents owe school districts by codifying the consistent body of case law that had developed after *Burlington* and *Carter* to guide a court's remedial discretion in awarding reimbursement. As respondent documents in his brief, that case law held that

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[2] The free appropriate education is supposed to be reflected in the particular child's "IEP," the Individualized Education Program developed by a team of teachers, parents, and school administrators to, among other things, describe the regular education, special education and related services, and other accommodations necessary to provide a student with an appropriate education. 20 U.S.C. § 1414(d).

public school districts must normally be given an opportunity to propose an appropriate placement before parents are allowed to seek tuition reimbursement for a unilateral private placement. *See* Resp. Br. 19-20. There is no evidence that Congress intended, by implication, to preclude categorically any judicial reimbursement remedy to parents whose child had not previously received special education and related services under the authority of a public agency.

A. It Is Rare For Parents To Unilaterally Place A Child With Disabilities In A Private School Based On A Public School's Failure To Offer The Appropriate Education Required By Federal Law

Contrary to the overstated rhetoric of petitioner and its *amici*, a ruling in favor of the parent in this case should not pose a significant burden on school districts. By contrast, a ruling in favor of petitioner would eliminate the only form of relief that can provide redress to parents who correctly act on the fact that a school district's proposed educational program for their child with disabilities would not constitute an appropriate education for the child.

1. The incidence of due process complaints seeking reimbursement for private placement is extremely small

Anecdotal stories that allege a trend of soaring private school placements for children with disabilities should not be confused with the facts. The United States Department of Education has tracked private placements for several decades. From a quantitative standpoint, the number of children with disabilities who are placed in private school is low and such placement by parents without the concurrence of the school district is extremely small.

In 2005, only 1.44% of children receiving services under the IDEA were in private placements at public

expense (88,098 children out of 6,110,829 children).[3] Moreover, the percentage of children in publicly funded private placements is not soaring. In fact, it has not changed significantly over the last 21 years, and has actually declined since 2001.[4]

The majority of private placements are "agreed placements," meaning that the school district and parents agree that the private placement is necessary to provide the child with an appropriate education. *See* 20 U.S.C. § 1412(a)(10)(B) (discussing children with disabilities who "are placed in, or referred to" private schools "by the State or appropriate local educational agency as the means of carrying out the requirements of" the IDEA); *Amicus* Br. of Nat'l School Bd. Ass'n, at 20 (acknowledging that the "overwhelming majority of these [private] placements were ones that school districts agreed were appropriate to ensure the child in question received the education mandated by IDEA"). *Amici* are not aware of a study that reports how many of these relatively few private placements were unilateral parent placements for which the school district has been ordered by a hearing officer or court to pay reimbursement, but an examination of the data regarding dispute resolution under the IDEA demonstrates that the actual number of reimbursement cases is miniscule.

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[3] Data Tables for State OSEP Data, IDEA Part B Educational Environment, Tbl. 2-5 (1996 through 2005) (2005), available at https://www.ideadata.org/tables29th/ar_2-5.htm.

[4] Since 1985, an average of 1.47% of all children served each year under the IDEA were in private placements at public expense, ranging from a high of 1.7% in 1986-87 to a low of 1.2% in 1993-94. Data Tables for State OSEP Data, IDEA Part B Educational Environment, Tbl. 2-5 (1996 through 2005) (2005), *available at* https://www.ideadata.org/tables29th/ar_2-5.htm; U.S. Department of Education, *Twentieth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, Appendix, Tbl. AB7 (1998) (1986-1996, age group 6-21); U.S. Department of Education, *Nineteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, Appendix, Tbl. AB7 (1997) (1985-1986, age group 6-21).

A school system in New York, just as anywhere else in the country, faces involuntary reimbursement of tuition for a child with disabilities in a private placement only if a due process hearing and any subsequent litigation determines that the public school could not provide the child an appropriate education. (Any other private placement will be an agreed placement, which are not at issue in this case.) It is rare for parent-school disputes to reach a due process hearing. Despite the more than 6 million children with disabilities entitled to the IDEA's protection, only approximately 3000 due process hearings are held nationwide each year.[5]

Disputes regarding private school placement (including requests for due process hearings or mediation, and other formal complaints to state agencies) are extremely rare. Data from the National Association of State Directors of Special Education reveal that of the estimated 25,000 to 27,000 disputes filed annually, private placement was the key issue in only 3.5% of disputes in 1999, 1.5% of disputes in 2000, and 3.3% of disputes in 2001. *See* Judy Schrag & Howard Schrag, National Association of State Directors of Special Education, *National Dispute Resolution Use and Effectiveness Study*, at 18, 24-25 (September 2004).

The Council of the Great City Schools is certainly correct when it notes, in its *amicus* brief in support of petitioner (at 23), that the volume of disputes involving tuition reimbursements in New York City is "unique." Indeed, many things about New York City make it atypical of the way that the IDEA functions nationally.

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[5] *See* General Accounting Office, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* (GAO-03-897), at 12-13 (2003). More than 80% of all due process requests are resolved or dropped before a hearing is held – only 18.7% of due process hearings reach a decision. Judy Schrag & Howard Schrag, National Association of State Directors of Special Education, *National Dispute Resolution Use and Effectiveness Study*, at 29-30 (September 2004) (74.9% are withdrawn and 6.4% are dismissed).

The vast majority of school districts across the country are not experiencing an increase in due process activity. To the contrary, 90% of school districts had no due process hearings at all in 2004-2005, and only 4% of school districts were involved in IDEA litigation of any kind. *See* Ellen Schiller, *et al.*, Abt Associates, Inc., *Marking the Progress of IDEA Implementation*, at 19-20 (April 2006). Nor is there a trend toward more due process proceedings. From 1999 to 2005, the 10% of school districts that had any ongoing formal dispute resolution procedures had a median of only one dispute per year, a rate that did not change over time. *Ibid.* Nationally, the median number of due process hearings per 10,000 students decreased from 2.4 to 1.4 between 1999 and 2005. *See* Ellen Schiller, Abt Associates, Inc., *Volume 1, The SLIIDEA Sourcebook Report (1999-2000, 2002-2003, 2003-2004, and 2004-2005 School Years)*, at 102 (April 2006).

By contrast, New York City had 1058 due process hearings proceed to decision in 2004, a total of 9.7 per 10,000 students.[6] Yet, even then, only 102 of those due process decisions involved parent tuition reimbursement.[7]

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[6] *See* New York City Department of Education, *School Based Expenditure Reports School Year 2003-2004 Citywide*, accessed at http://www.nycenet.edu/offices/d_chanc_oper/budget/exp01/y2003_2004/function.asp (2003-04 enrollment was 1,086,866); *see also* GAO, *Numbers of Formal Disputes Are Generally Low*, *supra*, at 13-14 (due process hearings are concentrated in a small number of States – California, Maryland, New Jersey, New York, Pennsylvania and the District of Columbia, and, within those States, a small number of primarily urban school districts).

[7] *See* New York State Office of Vocational and Educational Services for Individuals with Disabilities, *New York State Part B Annual Performance Report 2003-2004*, Appendix 18.5 (Distribution of Issues for Decided Impartial Hearing Cases July 1, 2003 – June 30, 2004 Displayed by Upstate and New York City), http://www.vesid.nysed.gov/sedcar/apr/apr0304data/appeigt5.htm.

2. Private placement costs generally are not significantly greater than public special education costs for comparable services and there is no evidence that wealthy parents are gaming the system

The popular press repeatedly quotes disgruntled school officials describing private placements as an epidemic of the "greedy needy." The claim is that wealthy parents are "gaming the system" seeking reimbursement for private school settings for children with trivial disabilities (sometimes implying that perhaps the children are not experiencing a disability at all but merely seeking an advantage) and for amounts of money far in excess of what would be spent in public school.[8] But this claim is not supported by real data. To the contrary, the facts demonstrate that the IDEA benefits predominantly lower-income children with disabilities, that the children who are most likely to be placed in private schools are those with less common disabilities, and that the cost of private placement is not significantly greater and, in places like New York City, can actually be less than that spent in public school.

a. The children who benefit most from IDEA are, by and large, not the children of the wealthy. Rather the IDEA's guarantees benefit most those who cannot afford other educational choices – children who are not only disabled, but also disadvantaged in other ways. Families

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[8] Jay P. Greene & Marcus A. Winters, *Debunking a Special Education Myth: Don't Blame Private Options For Rising Costs*, Education Next (Spring 2007) ("Tales of the 'greedy needy' – disabled students who receive unreasonably expensive services – appear regularly in the media."), *available at* http://www.hoover.org/publications/ednext/6018321.html. *See, e.g.*, Joseph Berger, *Private Schooling for the Disabled, and the Fight Over Who Pays*, N.Y. Times, March 21, 2007, at B7 (Spokesperson for Council for Great City Schools said, "Many wealthy, well-educated people are gaming the system in New York City and around the country."); Yilu Zhao, *Rich Disabled Pupils Go to Private Schools at Public Expense, Levy Says*, N.Y. Times April 17, 2002, at B7.

of children with disabilities are more often affected by poverty than others. *See* Mary Wagner *et al.*, *Special Education Elementary Longitudinal Study (SEELS): The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households*, at 28 (2002).

Children with disabilities are twice as likely to live with someone other than a biological parent, and 30 percent of children with disabilities live in foster care. *See* 150 Cong. Rec. S5353 (daily ed. May 12, 2004). Almost 25 percent of children with disabilities are living in poverty, compared with 16 percent of children in the general population. *See SEELS, supra*, at 28. And parents of children with disabilities are twice as likely to be unemployed. *See* Mary Wagner *et al.*, *The Individual and Household Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study-2 (NLTS-2)*, at 3-7 (2003). Overall, 68 percent of children with disabilities live in households with incomes less than $50,000, compared to only 53 percent of nondisabled children. *See SEELS, supra*, at 29.

Some parents make extreme financial sacrifices to front the cost of private placement pending hoped-for reimbursement. In New York, a few private schools are willing to enroll a child with a disability whose parents cannot afford to pay, and then wait to see whether the parents can obtain an order under the IDEA for reimbursement or, in some circumstances, prospective authorization for payments. *See, e.g.*, *Connors v. Mills*, 34 F. Supp. 2d 795, 804 (N.D.N.Y. 1998). Yet under petitioner's argument, there would be a category of children who would never be entitled to reimbursement. This could affect private schools' decisions regarding the enrollment of children of lesser financial means.

b. Private school placements at public expense are usually provided for children with the types of disabilities for which public schools have shown themselves least able to provide an appropriate education. Almost three-quarters (73%) of all private school placements are children

classified as emotionally disturbed, mentally retarded, multiply-disabled, or autistic.[9] This is so even though such children represent only 22% of all children served under the IDEA. (These same children are also disproportionately likely to request due process hearings. *See National Dispute Resolution Use and Effectiveness Study*, *supra*, at 20-21.)

By contrast, children with learning disabilities and speech/language disabilities account for only 15% of children in private placements, despite representing 70% of children served under the IDEA. This is not because these disabilities are trivial, as often portrayed in the popular press; to the contrary, they often constitute significant impediments to learning. Fortunately, however, school districts have more experience, and greater success, with these higher frequency disabilities. Of course, as noted below, non-compliance with the IDEA is rampant and thus it is disappointing, but not surprising, that school districts are sometimes not able to provide an appropriate education even for children with these more common disabilities, leaving parents no choice but to rely on private placements.

c. Whether educated in public school or private school, it often costs more to educate a child with a disability. Contrary to the views expressed by petitioner's *amici*, however, the cost does not vary significantly between public and private schools.

When educated within the public school system, students who are classified as emotionally disturbed, mentally retarded, multiply-disabled, or autistic have significantly higher per-pupil costs than other children with disabilities. Almost three-quarters of the children

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[9] Except as otherwise noted, the facts in this paragraph and the next paragraph are drawn from the U.S. Department of Education's Data Tables for State OSEP Data, IDEA Part B Educational Environment, Tables 1-3 and 2-5 (2005), https://www.ideadata.org/tables29th/ar_1-3.htm and https://www.ideadata.org/tables29th/ar_2-5.htm.

that the Center for Special Education Finance refers to as "high expenditure" students are drawn from children with these disabilities: multiple disabilities (32.3%); autism (17.2%); emotional disturbance (16.2%); and mental retardation (7.1%).[10]

The average cost of educating a "high expenditure student" in public school in 1999-2000 was $39,909 for elementary school, $35,924 for secondary school, and $57,129 in a public school dedicated to special education.[11] Although no similar breakdown is available for private schools, the average expenditure on tuition, fees, and other special services for children with disabilities placed in private schools or other public agencies was $25,580 in 1999.[12]

In New York City, the per-pupil cost of special education in public schools actually exceeds what respondent seeks in reimbursement in this case. For the 1999-2000 school year, New York City reported that the average cost to educate a special education student within the regular public schools was $26,497, and the average per pupil cost to educate a student at a public self-contained special education school was $41,673.[13] These

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[10] *See* Jay G. Chambers *et al.*, Special Education Expenditure Project, Center for Special Education Finance, *Characteristics of High-Expenditure Students With Disabilities, 1999-2000, Report 8*, at 21 (May 2004).

[11] *See id.* at 4-5.

[12] *See* Jay G. Chambers *et al.*, Special Education Expenditure Project, Center for Special Education Finance, *Total Expenditures for Students with Disabilities, 1999-2000: Spending Variation by Disability, Report 5*, at v, 4-5 (June 2003).

[13] Office of Financial & Management Reporting, New York City Department of Education, *School Based Expenditure Report School Year 1999-2000, Report 5: Expenditures by Function, Student Type and Instruction Level*, http://www.nycenet.edu/offices/d_chanc_oper/budget/exp01/y1999_2000/function.asp?R=2. The Special Notes to the School-Based Expenditure Report explain that Related Services costs are understated for special education students, which suggests that the actual special education costs are even higher than those reported. http://www.nycenet.edu/offices/d_chanc_oper/budget/exp01/y1999_2000/appendix.asp#_HOW_EXPENDITURES_WERE_3.

numbers are significantly greater than the average settlement paid by New York City in unilateral placement cases from 2003 to 2006, which its *amicus* claims ranged from $13,717 to $18,552. *See Amicus* Br. of Council of Great City Schools, at 22.

3. Private placement costs fall only on school districts who do not provide the appropriate education required by federal law

Many of the objections voiced by petitioner and its *amici* are objections to the cost of special education or court-ordered placements generally. They gloss over the fact that those decisions by hearing officers and judges to reimburse parents of children with disabilities placed in private school are based on findings that public school systems did not comply with the IDEA because they did not offer an appropriate education for the children. Those decisions are not easily reached. In light of this Court's recent decision in *Schaffer v. Weast*, 546 U.S. 49, 59-60 (2005), parents will (absent state law to the contrary) normally bear the burden of proof of showing that the school district's proposal does not comply with the IDEA. Furthermore, the IDEA now makes clear (in a provision enacted after the events at issue in this case) that certain procedural violations of the IDEA are not sufficient to have an IEP declared invalid. *See* 20 U.S.C. § 1415(f)(3).

Compliance and monitoring reports by the United States Department of Education have revealed that in many localities, school districts are not in compliance with federal law. The myriad of cases in which federal and state courts have made similar findings confirms this reality.

The National Council on Disability, an independent federal agency, succinctly summarized the Department of Education's findings: "Every state was out of compliance with the IDEA requirements to some degree; in the sampling of states studied, noncompliance persisted over many years." National Council on Disability, *Back to School on Civil Rights: Advancing the Federal Commitment to Leave No Child Behind,* at 7 (January 25,

2000). Indeed, seven years earlier, the same federal agency reported that the Department of Education had determined that "150 of the 165 local public agencies" surveyed were "in varying degrees of noncompliance with federal and state IEP mandates" and that another Department of Education study of 40 local school districts across 21 States found that almost 10 percent of students with disabilities "either do not have an IEP or have not been properly evaluated" in violation of federal law. National Council on Disability, *Serving the Nation's Students with Disabilities: Progress and Prospects*, at 3, 25 (March 4, 1993).

The United States Commission on Civil Rights likewise reported, based on a Department of Education survey, that tens of thousands of children with disabilities "continue to be excluded from the public schools, and others are placed in inappropriate programs." U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 28 & n.77 (1983).

New York reflects this national reality. New York has been out of compliance with various of the IDEA's requirements for decades. *See* National Council on Disability, *Back to School on Civil Rights*, *supra*, at 142-143. In 1979, a federal court found in a class action lawsuit that New York and New York City had "not made available to the plaintiff class [of children with disabilities] a free appropriate public education in a timely manner, thus violating the requirements of federal law." Judgment, at 6, *Jose P. v. Ambach*, Civ. No. 79-270 (E.D.N.Y. Dec. 14, 1979), available at http://www.advocatesforchildren.org/litigation/litdocs/josepdocs/JosePJudgment_Dec79.pdf.

That lawsuit has documented the continuing failure of petitioner to comply with the IDEA. A recent independent evaluation of the New York City special education program, paid for by the petitioner, noted that "the continued *Jose P.* litigation [has] demonstrated, the NYC Department of Education, like many large urban school districts, has long-standing significant problems in meeting its obligation to provide quality education to its

students with disabilities within federal and state legal requirements." Thomas Hehir *et al.*, *Comprehensive Management Review and Evaluation of Special Education*, at 15-19, 47-49 (September 20, 2005). For example, during the 2004-2005 school year, the percentage of eligible students who did not receive special education placements within 60 days (as required by state regulations) ranged from 54% to 92%, depending on the month. *Id.* at 65. The percentage of special education students entitled to related services who were not receiving them ranged from 10% to 66%, depending on the month and the particular services. *Id.* at 42.

There is also a comprehensive body of state administrative decisions documenting the fact that the New York City Department of Education does not provide the appropriate education required by federal law. *See, e.g.*, *Application of Child with a Disability*, Appeal No. 05-010 (March 16, 2005) (finding that the school district had failed to offer an appropriate placement to a child with quadriplegia who had previously thrived in mainstream environment but was offered a classroom where all the students were severely disabled and non-verbal); *Application of a Child with a Disability*, Appeal No. 03-078 (October 30, 2003) (finding that the school district failed to offer an appropriate placement to a tenth grade student with a learning disability who was functioning at a fourth grade level but was offered a placement in the same general education setting with related services in which he had previously failed to advance and, in the following year, was improperly denied any special education services).

School districts in New York sometimes concede during due process hearings that they have failed to offer an appropriate education. In *Application of a Child with a Disability*, Appeal No. 01-108 (March 26, 2002), for example, the school district "failed, by its own admission, to develop a valid IEP and make a timely placement" for an emotionally disturbed child." In another case arising out of Hyde Park, New York that is pending before this Court, the school board is challenging a family's placement of a child in a private school despite the fact that the

school system conceded at the due process hearing that its proposed IEP did not offer an appropriate education for the child with a disability. *Frank G. v. Board of Educ.*, 459 F.3d 356, 361 (2d Cir. 2006), *petition for cert. pending*, No. 06-580.[14]

Even when the school district offers an appropriate education, it often does not deliver the special education and related services described in the IEP – services that, by definition, the school district has itself agreed are necessary to an appropriate education. The facts in *Application of a Child with a Disability*, Appeal No. 99-21 (January 13, 2000), represent a typical scenario. In that case, the services recommended by the State for a child with Erb's Palsy and Tourette's Syndrome were not available at the placement offered by the school district. Accordingly, the state hearing officer found that the school district had failed to provide an appropriate education, noting that "[a] placement which cannot be implemented is not an appropriate placement." *See also X v. New York State Educ. Dep't*, 975 F. Supp. 546 (S.D.N.Y. 1997) (finding that the school district failed to provide an appropriate education to a child with autism where the offered placement did not have the services mandated by the IEP); David Herszenhorn, *New Deputy Says Fixing Special Education is Paramount*, N.Y. Times, March 19, 2004, at B6 (reporting that 9,963 students were awaiting counseling, 15,354 were awaiting speech therapy, 10,533 were awaiting occupational therapy and 4,023 were awaiting physical therapy).

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[14] According to the facts as described in the court of appeals' opinion, the child's declining performance at a Catholic school prompted his parents to request an evaluation from the public school. During the evaluation process, an independent neuropsychologist recommended that the child, who had been diagnosed with attention deficit hyperactivity disorder at the age of three, be placed in a small classroom of 12 students with an aide and related services. The school district's IEP nonetheless proposed a classroom of 26-30 students.

B. Congress Did Not Clearly Manifest An Intent To Prohibit Courts From Ordering Reimbursement When A School District Violates Federal Law

The authority of courts to order reimbursement for the relatively few children who must be placed in private school in order to receive the free appropriate education provided by the IDEA has not been curtailed by Congress.

When parents are confronted with a school district that is violating federal law by its failure to propose or provide their child a free appropriate education, as required by the IDEA, they are dependent on the federally-designed administrative "due process" proceedings and ultimately on the courts to vindicate their federal rights. It takes time, however, for this comprehensive process to resolve disputes. In *Burlington*, this Court described the process as "ponderous" and took note of the fact that a "final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed." 471 U.S. at 370. Indeed, States (including New York) are often in violation of the IDEA's requirements for how long a due process proceeding may take. *See* National Council on Disability, *Back to School on Civil Rights*, *supra*, at 121 (Department of Education found 36% of States failed to resolve due process hearings within the 45 days required by regulations); Office of Vocational and Educational Services for Individuals with Disabilities, New York State Education Department, *New York State Annual Performance Report for 2005-06*: *IDEA Part B State Performance Plan 2005-2010*, at 73-74 (February 2007) (only 83.4% of due process hearings meet regulatory timelines).

The question here is whether the IDEA leaves parents of children with disabilities only the choice between accepting the school district's proposed IEP for an education that is not appropriate or paying for an appropriate placement on their own dime.

In *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359, 372 (1985), and again in *Florence County School District v. Carter*, 510 U.S. 7 (1993), this Court held that Congress did not intend to force parents to choose between "an appropriate education and a free one." The Court held that the IDEA authorizes parents to receive reimbursement of reasonable private school tuition if the school district was not offering an appropriate education.

There is no clear statement in the text of the current IDEA that restricts the remedial authority of the courts to order such reimbursement and thus no basis for this Court to overrule those holdings.

1. Congress has not altered the statutory provisions that this Court correctly interpreted in *Burlington* and *Carter* to authorize courts to order reimbursement when federal law has been violated

Petitioner contends that Congress's addition of Section 1412(a)(10)(C) in 1997 eliminated the authority of the courts to award tuition reimbursement as a remedy for violation of federal law when the victim of the federal law violation, the child with a disability, has not "previously received special education and related services under the authority of a public agency." But Congress did not so provide.

This Court relied on two statutory provisions as the basis for its determinations in *Burlington* and *Carter* that courts can award reimbursement. Congress did not alter either of those provisions (save for changes in terminology) in 1997 or by subsequent amendments. First, the Court looked to Section 1400(d)(1), which sets forth the purpose of the IDEA: to ensure that all children with disabilities (formerly described as "handicapped" children) "have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs" and to ensure "that the rights of children with disabilities and parents of such

children are protected." 20 U.S.C. § 1400(d)(1). Second, the Court relied on Congress's grant to federal courts the authority to hear claims by aggrieved parents that their statutory rights were being violated without regard to the amount in controversy and authorized those courts to "grant such relief as the court determines is appropriate" for violations of the statute. *Id.* §§ 1415(i)(2)(A) & (C)(iii).

In *Burlington*, the Court held in a unanimous opinion by Chief Justice Rehnquist that the language used by Congress in that grant of authority to award "appropriate" relief "confers broad discretion on the court." 471 U.S. at 369. The Court concluded that "the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act," which the Court described as "principally to provide handicapped children with 'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.'" The IDEA, the Court noted, contemplates that such an education may be provided in private schools at public expense. *Ibid.*; *see* 20 U.S.C. § 1412(a)(10)(B) (discussing school district's obligations when children with disabilities "are placed in, or referred to" private schools "by the State or appropriate local educational agency as the means of carrying out the requirements of" the IDEA).

The Court explained that, absent an equitable remedy of reimbursement, the parents were faced with the Hobson's choice to accept a school district's proposed placement "to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." 471 U.S. at 370. The Court concluded that "[i]f that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete." *Ibid.* Congress "undoubtedly" could not have intended that result. *Ibid.* This Court was therefore "confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents." *Ibid.*

In *Carter*, the Court unanimously reaffirmed that the "IDEA's grant of equitable authority empowers a court 'to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.'" *Carter*, 510 U.S. at 12. The "IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free. To read the provisions of [the IDEA] to bar reimbursement in the circumstances of this case would defeat this statutory purpose." *Id.* at 13-14 (internal citation omitted). The Court clarified that parents are "entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act." *Id.* at 15. In addition, courts "fashioning discretionary equitable relief under IDEA must consider all relevant factors," and can reduce or eliminate reimbursement based on "equitable considerations." *Id.* at 16.

The broad statutory grant of authority in Section 1415(i)(2)(C)(iii) to award "appropriate" relief, relied on by the Court in both *Burlington* and *Carter*, has not been amended. Nor have the purposes of the IDEA. Thus, nothing in the text of the IDEA reflects an intent by Congress to constrict the power of the courts to award "appropriate" relief, including reimbursement of tuition, to parents under appropriate circumstances.

Section 1412(a)(10)(C) describes circumstances under which the courts "may" grant or deny reimbursement when a child "previously received special education and related services under the authority of a public agency." But that provision does not prohibit the exercise of a court's equitable authority to award reimbursement to parents in circumstances that fall outside the scope of Section 1412(a)(10)(C). Indeed, as we discuss next, any such repeal of equitable authority would require a clear statement on the part of Congress, something that is lacking in Section 1412(a)(10)(C) because such a repeal

cannot be inferred from a positive grant of authority to provide relief in other cases.

2. Section 1412(a)(10)(C) does not contain a clear statement restricting the courts' previously recognized equitable authority to award reimbursement to remedy a violation of federal law

This Court has consistently recognized that once Congress confers jurisdiction on a federal court over a cause of action, the court possesses "*all* the inherent equitable powers * * * available for the proper and *complete* exercise of that jurisdiction." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). The scope of this equitable authority is as broad as the violation warrants because Congress's act of vesting jurisdiction in an equity court must be understood in light of the "historic power of equity to provide complete relief in the light of statutory purposes." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960); *see also Porter*, 328 U.S. at 399; *cf. Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

If Congress wishes to divest federal courts of their broad equitable authority, Congress must do so by a "clear and valid legislative command." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001); *see also Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (holding that federal courts retain their full equitable authority "[a]bsent the clearest command to the contrary from Congress"); *Porter*, 328 U.S. at 398 (providing that the "comprehensiveness" of a court's equitable authority can be limited only by a "clear" legislative command).

Thus, this Court has held that a statute that identifies particular equitable remedies that can be awarded does not contain the needed clear statement to divest courts of their general equitable authority to award other equitable

remedies. *See Porter*, 328 U.S. at 398-399. This is precisely the type of inference that is insufficient to constitute a clear statement by Congress to divest federal courts of authority. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Id.* at 398 (quoting *Brown v. Swann*, 35 U.S. 497, 503 (1836)).

As Justice Frankfurter explained for the Court, "[o]ne thing [that] is clear" is that "[w]here Congress wished to deprive the courts of this historic [equity] power, it knew how to use apt words." *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11, 17 (1942). If there is any statutory ambiguity, it thus must be read in favor of the courts retaining their full equitable authority. This is true even if it is clear that Congress intended to impose some limits on the courts' remedial authority. In *Mitchell*, for example, this Court held that a statutory provision denying courts the authority to award "unpaid minimum wages" under the Fair Labor Standards Act as part of restitution did not prohibit a court from awarding unpaid wages incident to a wrongful discharge claim under the same Act. The Court emphasized that there was "no warrant" for construing the provision as "a general repudiation of equitable jurisdiction to order reimbursement to effectuate the policies of the Act." 361 U.S. at 295-296.

Section 1412(a)(10)(C) does not meet the clear statement rule articulated in *Porter*, *Mitchell*, and their progeny. It cannot be read to preclude categorically any reimbursement remedy to parents whose child with a disability has not previously received special education and related services under the authority of a public agency. Instead, as respondent argues, that provision simply identifies factors that a court "may" consider in exercising its discretion. As noted above, those factors reflect the consistent body of case law that developed after *Burlington* and *Carter* to guide the courts' remedial discretion in awarding "appropriate" relief under Section 1415(i)(2)(C)(iii).

3. Petitioner's reading of Section 1412(a)(10)(C) would lead to absurd results and is not supported by legislative history

Other basic tools of statutory construction confirm that petitioner's reading of the statute cannot be sustained to categorically exclude from the equitable remedy of reimbursement children with disabilities who had not "previously received special education and related services under the authority of a public agency" but have established that they have been denied an appropriate education by the public school.

a. Reading the statute as petitioner suggests could lead to absurd results, contrary to a fundamental rule of construction. *See, e.g.*, *United States v. Kirby*, 74 U.S. 482, 486 (1868) ("All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.").

First, it would apparently deny reimbursement to a child with a disability if the child "received" *no* special education and related services, even if the school district acknowledged that the child should be receiving such education and services. For example, if a child is enrolled in public school and the IEP provides that she is to receive special education and related services, but the school district cannot, for whatever reason, provide any of them to the child, then she has not "received" any education or services under the authority of the school district and, under petitioner's view, would apparently not be entitled to a reimbursement remedy if her parents placed her in private school where she could get the services. Instead, the parent's only remedy under petitioner's view of the IDEA would be to seek a due process hearing to challenge the failure to provide the services that the school already has acknowledged are necessary and had promised to provide and to allow their child to remain in public school without receiving services until those proceedings are completed. At the same time, petitioner's reading would apparently permit reimbursement to a child who received

some special education and related services but enrolled in a private placement that could provide *all* the education and services appropriate.

Second, petitioner's reading of the statute would require parents, in order to become eligible for reimbursement, to accede to the child's placement in a clearly inappropriate setting for some undefined period of time simply to have shown that they "tried it out." Meanwhile, that child with a disability will lose the educational value of that time – an educational opportunity that cannot be recouped and which may create even further learning difficulties for the child. Section 1412(a)(10)(C) expressly permits a court to order reimbursement even absent notice in situations in which physical or emotional harm might result from the public school placement. *See* 20 U.S.C. § 1412(a)(10)(C)(iv)(I)(cc) & (II)(bb). Yet petitioner would apparently always preclude reimbursement when such harm would befall a child who had not previously received special education and related services under the authority of the school district.

b. Nothing in the legislative history suggests that Congress intended this result or sought to eliminate the courts' equitable authority to provide relief for children who did not previously receive special education and/or related services under the authority of a public agency, so long as the parents can demonstrate that the school district is not offering an appropriate education.

To the contrary, to the extent this issue was discussed at all, the legislative history confirms that Section 1412(a)(10)(C) was intended to codify the prevailing case law that whether parents provide notice to the school district that they intend to place their child in private school because of dissatisfaction with the proposed IEP is a relevant factor for a court to consider in exercising its remedial discretion.

The small amount of discussion at the hearings regarding the reimbursement issue prior to 1997 reflects only a desire that Congress clarify that notice and

cooperation by parents were appropriate factors that should be considered in determining whether to award reimbursement. There was no suggestion that children who had not previously received special education or related services from a school district should never receive reimbursement, the view currently urged by petitioner.

In a congressional hearing regarding the reauthorization of the IDEA in 1994, the National School Board Association urged Congress to amend the IDEA to expressly provide that "[i]n cases where parents are seeking to place their child in a private school, the school needs to be given adequate advance notice of the services the parents desire." *Hearing on the Reauthorization of the Individuals with Disabilities Education Act: Before the Subcomm. on Select Educ. & Civil Rights of the House Comm. on Educ. and Labor*, 103d Cong., at 43 (1994). It explained that requiring advance notice "is cost efficient and still fully protects the rights of students with disabilities." *Ibid.*

The following year, the General Counsel of the Orange County Department of Education explained to Congress that his office had been working with various national and state education organizations to provide recommendations for changes in the IDEA. He stated that the proposal that had been developed "[w]ith regard to unilateral placement of students in private facilities" was that parents would be required "to notify school districts before placing their child in a private school that they intend to seek tuition reimbursement from the school district." *Hearings on the Individuals with Disabilities Education Act: Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Economic and Educational Opportunities*, 104th Cong., at 279 (1995); *see also id.* at 290 (California School Boards Association urges provision requiring parents "to provide ample notice and opportunity for the districts to provide appropriate services through their own public means" before "unilateral placement of students in non-public schools by parents"); *Hearing on Early Childhood, Youth & Families Staff Draft of the IDEA Improvement Act: Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on*

Economic and Educational Opportunities, 104th Cong., at 10 (1996) (California school district urges that reimbursement be denied unless there is notice and "the parents or guardian have cooperated in good faith with the local education agency to develop an individualized education program for the child or youth prior to seeking the non-public service or placement").

When a predecessor to Section 1412(a)(10)(C) appeared in a version of the bill reported out of the House Committee on Economic and Education Opportunities in 1996, the committee stated that school districts were sometimes "confronted with the very rare situation where parents place a child in private school without notifying the school district" and that the proposed bill "would require such parents to notify, at a minimum, a local education agency of their concerns, and provide the opportunity for the school to evaluate the child and determine if it can meet that child's needs." H.R. Rep. No. 104-614, at 12 (1996). That committee bill passed in the House but no action was taken in the Senate.

The key point is that the intent of the amendments was to evaluate the child and develop and implement an IEP that "meet[s] that child's needs." *Ibid.* If the school district could not meet those needs, it would be inconsistent with the IDEA and bad for the child to be placed on an inappropriate educational program.

In hearings the following year, some witnesses supported what they described as the "written notification" language of what would become Section 1412(a)(10)(C). *See Hearings on H.R. 5, The IDEA Improvement Act of 1997: Before the Subcomm. on Early Childhood, Youth & Families of the House Comm. on Educ. & the Workforce,* 105th Cong., at 12 (1997) (Los Angeles County Office of Education); *id.* at 80-81 (California Special Education Local Plan Area). A few witnesses urged that Congress eliminate any reimbursement remedy for a unilateral placement in private school. *See Reauthorization of the Individuals with Disabilities Education Act: Before the Senate Comm. on Labor & Human Resources*, 105th Cong.,

at 31 (1997) (Chairman of Bedford School Board); *id.* at 106 (Council for Exceptional Children). But there was no suggestion that Congress should eliminate the reimbursement remedy for one category of students (*i.e.*, those who did not previously receive special education and related services under the authority of a public agency) while permitting it for others.

Thus, it is the "notice" concept that is reflected in the Senate and House Committee reports in 1997, both of which describe the provision as providing that if "the parents do not comply with the notice [requirement of the bill] and evaluation requests [of the public agency] or engage in unreasonable actions, hearing officers and courts may reduce or deny reimbursement to parents for unilateral private placements." S. Rep. No. 105-17, at 12 (1997); H.R. Rep. No. 105-95, at 92 (1997).

At the same time, Congress enacted other provisions to deter and sanction frivolous claims by parents and to encourage reasonable settlements. *See* 20 U.S.C. §§ 1415(i)(3)(D) & (F), (i)(3)(B)(i)(II) & (III). These generally applicable provisions further the interests identified by petitioner and its *amici* without absolutely depriving a class of children with disabilities the equitable remedy that this Court has twice recognized as essential to the purposes of the IDEA.

CONCLUSION

For the reasons set forth above and in respondent's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

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BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F., ON BEHALF OF GILBERT F., A MINOR CHILD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION AND AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF PETITIONER

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Respondent.

**On Writ of Certiorari to the
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for the Second Circuit**

BRIEF FOR AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION AND AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. All parties have filed consent letters with the Clerk regarding *amicus* briefs.

Columbia and the U.S. Virgin Islands. NSBA represents over 95,000 of the Nation's school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 46.5 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

NSBA and AASA regularly represent their members' interests before Congress and federal and state courts and have participated as *amicus curiae* in cases before this Court involving the Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§ 1400 *et seq.* ("IDEA"). *See, e.g.*, *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455 (2006); *Schaffer* v. *Weast*, 126 S. Ct. 528 (2005).

Recognizing that all children with disabilities have a right to be provided with a free appropriate public education, NSBA and AASA have consistently supported the rights of disabled children. At the same time, both are also fully cognizant of the substantial financial and human resources that public school districts devote each and every year to educating students with disabilities.[2] These resources vastly exceed the partial funding provided by the federal

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[2] "Roughly a third of [New York City's] $14 billion education budget is spent on special ed, serving some 150,000 students out of a total school population of 1.2 million." Editorial, *Special-Ed Savings*, N.Y. Post, Nov. 30, 2005 at 30.

government under IDEA.[3] The burden on local school districts also is increased by an adversarial conception of IDEA, which exacts an even greater toll on limited educational resources and thus exacerbates the difficulty for school districts in deciding what educational opportunities they can afford to provide for children.

The issue presented in this case, therefore, is of manifest importance to NSBA and AASA: whether Congress in IDEA authorized tuition reimbursement for parents, like respondent, who unilaterally place their children in private schools before ever trying—and without ever intending to try—the proposed Individualized Education Program ("IEP") developed in a collaborative effort between school district employees and a child's parents or guardians.[4] NSBA and AASA, like the petitioner, contend that the answer is no.

SUMMARY OF ARGUMENT

In *Burlington School Committee* v. *Department of Education*, 471 U.S. 359 (1985), this Court held that private school tuition reimbursement was an available remedy under IDEA if a school district failed to provide a free appropriate public education to a child with a disability, even though the statute was silent on that point. Congress thereafter amended IDEA in 1997 to allow a tuition reimbursement remedy only

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[3] While the Federal Government committed to funding 40 percent of the cost per pupil for special education when it first enacted the predecessor statute to IDEA in 1974, it currently funds less than 20 percent of those costs, creating a cumulative funding gap of more than $59 billion for the last four fiscal years. NSBA, *Federal Funding for Education* at 2 (Mar. 2006), *available at* http://www.nsba.org/site/docs/35100/35033.pdf.

[4] School districts spend more than $6.7 billion annually on assessments, evaluations, and IEP-related activities alone. *See* Special Educ. Expenditure Project, American Inst. of Research, *What Are We Spending on Special Education Services in the United States, 1999-2000?* at 13-14 (updated 2004), *available at* http://www.csef-air.org/publications/seep/national/AdvRpt1.PDF.

where the child has "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10) (C)(ii).

The Second Circuit decision giving rise to this case, *Frank G.* v. *Bd. of Educ. of Hyde Park*, glossed over the plain language and clear intent of the 1997 amendment, disagreeing with Congress' policy choice and finding that interpreting this provision according to its plain meaning would not be "compatible with the rest of the law" and would create an "absurd" result. 459 F.3d 356, 372 (2d Cir. 2006). The Court of Appeals erred. Because IDEA favors public school placements, provides few rights for private school students, establishes a collaborative framework that integrally involves parents and public school officials, and provides multiple methods for timely dispute resolution, Congress sensibly required parents to work with public school districts before being able to unilaterally obtain a publicly funded private school placement.

Congress enacted the Education of All Handicapped Children Act of 1975 with the goal of opening "the door of *public* education to handicapped children"—not to provide publicly funded private school education to children with disabilities. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 192 (1982) (emphasis added). Renamed IDEA in 1990, the Act today continues to "ensure that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). In accord with its fundamental purpose, virtually all of the Act's many substantive and procedural requirements apply only to public schools and protect only children attending public schools.

In addition, the structure of IDEA favors public school placements. While the Act also addresses the needs of children with disabilities whose parents elect to place them in private schools, it expressly does not create any individual

entitlement to special education services for such children. To the contrary, the main provisions of the Act with respect to students in private schools are designed to make sure that they are found and made aware of their right to a free appropriate *public* education. Indeed, IDEA even limits the circumstances in which a public school district can resort to a private school placement for a child whose needs the district does not believe it can meet.

The Act also establishes a collaborative framework that requires ongoing cooperation between school districts and parents or guardians in developing, implementing, and refining each child's educational program in public schools. Congress' decision to require parents to give this process a fair chance before being eligible for private school tuition reimbursement supports this overall framework. The Act demands the good faith participation of both school district personnel and the parents and guardians of disabled children. The cooperative process results in the development, implementation and continuous adaptation of an IEP designed to ensure that each student receives a free public education that is appropriate to his or her individual needs. The process is dynamic; it gives parents multiple opportunities to effect a change in services they believe to be inadequate. These opportunities, along with the prompt dispute resolution mechanisms mandated by the Act, alleviate any fear that children with disabilities would be forced to languish for extended periods in inappropriate placements to preserve their entitlement to tuition reimbursement. By ignoring these aspects of the law, the Second Circuit's ruling seriously undermines IDEA's collaborative framework by creating a disincentive for the parents of students with disabilities to cooperate in good faith with a public school district.

Allowing unilateral private placements for parents who have not given a public school placement a fair chance also would increase the already substantial costs of the Act. Litigation costs, of course, would increase. More expensive

private school placements would be sought and approved. The federal government funds only about twenty percent of IDEA's cost, meaning that the inevitable result of increased costs would be to divert state and local resources to private schools and diminish the funding available for special education and regular education programs in public schools.

The decision below should be reversed.

ARGUMENT

THE 1997 AMENDMENT TO IDEA LIMITING AWARDS OF TUITION REIMBURSEMENT IS ENTIRELY CONSISTENT WITH THE PURPOSE OF THE ACT, ITS COLLABORATIVE FRAMEWORK AND SOUND PUBLIC POLICY.

As part of its 1997 IDEA amendments, Congress sensibly adopted a basic threshold requirement for tuition reimbursement claims by parents who unilaterally place their children in private school: tuition reimbursement is only available for children who "previously received special education and related services under the authority" of the public school district. 20 U.S.C. § 1412(a)(10)(C)(ii). The plain language of this provision makes clear that where a child has not previously received special education from a school district, neither a court nor a hearing officer has authority to reimburse tuition expenses arising from a parent's unilateral placement of the child in private school.

The Second Circuit found ambiguity in this clear language because it misunderstood IDEA's purpose, structure, and the manner in which the Act works in practice. *Frank G.*, 459 F.3d at 370. A straightforward interpretation of Section 1412(a)(10)(C)(ii), however, is consistent with Congress' intent to "open the door" to public education for students with disabilities while respecting our Nation's tradition of local control of public education. *Rowley*, 458 U.S. at 192. It also furthers the Act's collaborative framework by preventing parents who lack genuine interest

in educating their child in a public school setting from treating the IEP process as a potential lottery ticket to a government funded private school education. And it is consistent with IDEA's deference to local school district's educational expertise.

A. The Plain Language And Legislative History Of The Amendment Show Congress' Clear Intent To Authorize Tuition Reimbursement Only When Students Have Tried A Public Placement.

Although not mentioned as a form of relief in the Act prior to the 1997 amendments, this Court endorsed private school tuition reimbursement as within the equitable remedies available for violations of the Act. *See Burlington*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7 (1993). In 1997, consistent with both IDEA's goal of educating children with disabilities in the regular public education setting whenever possible and the collaborative structure of the Act, Congress wisely limited the availability of the tuition reimbursement remedy to situations in which parents or guardians have previously cooperated in the development and receipt of publicly directed special education and related services. The amendment simply requires that parents of children with disabilities give public schools a realistic chance to serve their children before unilaterally rejecting what the public school offers—and forcing the school district to fund a private school education.

The 1997 amendment thus plainly states that private school tuition reimbursement is only available when a student has "previously received special education or related services." 20 U.S.C. § 1412(a)(10)(C)(ii). In enacting this provision, Congress explicitly limited the circumstances in which the retroactive tuition reimbursement that this Court found in *Burlington* and *Carter* could be "appropriate" relief for a failure to provide a free appropriate public education. Under the governing law, then, retroactive tuition reimbursement can only be "appropriate" where parents have given the

public school districts some opportunity to attempt to provide a free appropriate public education.

This conclusion is dictated by the plain language of the statute. The starting point for interpreting a statute is always the language of the statute itself. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). When the language of the statute is plain, that is also "where the inquiry should end" because " 'the sole function of the courts is to enforce it according to its terms.' " *United States* v. *Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989) (citation omitted). This principle applies with force here.

Section 1412(a)(10)(C) is unambiguous on its face: "the plain language of the statute [] mandates that prior receipt of special education and related services is a prerequisite to reimbursement." *Lunn* v. *Weast*, No. 05-2363, 2006 WL 1554895, at *7 (D. Md. May 31, 2006); *see also Baltimore City Bd. of Sch. Comm'rs* v. *Taylorch*, 395 F. Supp. 2d 246, 249 (D. Md. 2005) (where student has not previously received publicly directed special education, "the statutory text commands (and permits) only one result: her parents are not eligible for tuition reimbursement under the IDEA"); *Carmel Cent. Sch. Dist.* v. *V.P. ex rel. G.P.*, 373 F. Supp. 2d 402, 415 (S.D.N.Y. 2005) (holding tuition reimbursement not available as a matter of law, without regard to *Burlington* factors, where parents "never placed their child in the public school and never contemplated doing so" and did not give public school "a meaningful opportunity" and a "realistic chance" to see if it could implement an IEP allowing the student to be educated in the public schools); *Forest Grove Sch. Dist.* v. *T.A.*, No. 04-cv-331, Order & Opinion 21 (D. Or. May 11, 2005) ("The plainest reading of the statute is that *only* children who had previously received special education services from the District are even eligible for such tuition reimbursement.") (emphasis in original).

But even if the provision were ambiguous, the legislative history reveals the same intent: that parents not be allowed to receive tuition reimbursement for a unilateral private placement if their child has never previously received special education or related services from a public school district. Both the House and Senate Reports clearly state that "parents may be reimbursed for the cost of a private educational placement *under certain conditions*"—and then identify one of those conditions as "[p]reviously, the child must have had received special education and related services under the authority of a public agency." *See* H.R. Rep. No. 105-95 at 93(1997) (emphasis added); S. Rep. No. 105-17 at 13 (1997).

It also is important to remember that "resolution of the question presented in this case is guided by the fact that Congress enacted IDEA pursuant to the Spending Clause." *Arlington*, 126 S. Ct. at 2458. Because legislation enacted under the Spending Clause is "much in the nature of a contract," any conditions attached to funding must be laid out "unambiguously" in order to be binding, and states must accept these conditions "voluntarily and knowingly." *Id.* at 2459 (citing *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Thus, the issue here is whether given the plain language of Section 1412(a)(10)(C)(ii), IDEA "furnishes clear notice regarding the liability at issue in this case." *Arlington*, 126 S. Ct. at 2459. Clear notice, as the Court has recently reiterated, "begin[s] with the text." *Id.*

To determine whether the requisite clear notice exists here, the Court "must view the IDEA from the perspective of a state official" trying to determine "the obligations that go with those funds." *Id.* The clarity of the condition is determined in the first instance by looking at the text of the statute itself. *Id.* And although IDEA's "overarching goal" is to ensure education for all disabled children, the Act does not seek to achieve this goal "at the expense of all other considerations, including fiscal considerations." *Id.* at 2463. For Spending Clause legislation, like IDEA, the key is "what

the States are clearly told regarding the conditions that go along with the acceptance of those funds." *Id.* Thus, when the text of a statute contains no clear notice of a condition on federal funding, the Court is not at liberty to impose one.

A review of state regulations regarding tuition reimbursement for unilateral placements further demonstrates the lack of clear notice. Numerous states have adopted regulations similar to Section 1412(a)(10)(C)(ii). *See, e.g.*, N.J. Admin. Code 6A:14-2.10 (2006); Md. Code Regs. 13A.05.01. 16B(3)(d) (2006). State administrative hearing officers have interpreted these state regulations to preclude reimbursement if a student has not previously received special education and related services from the school district.[5]

B. Congress' Decision To Limit Tuition Reimbursement In This Way Is Consistent With The Act's Overall Purpose And Structure.

The Second Circuit gave little heed to the amendment's plain language, Congress' clear intent, or the understanding of the state and local officials charged with implementing IDEA because it believed that the result was inconsistent

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[5] *See, e.g., J.P.* v. *Wyckoff Bd. of Educ.*, N.J. OAL Docket No. EDS 09100-04, 2005 WL 2306866, at *33 (Sept 9, 2005) (holding "phrase 'who previously received special education and related services from the district of residence,' N.J. A.C. 6A:14-2.10(b), has been interpreted in New Jersey's administrative law courts to mean that parents who unilaterally move their child to a private placement without the consent of the school district are precluded from reimbursement if their child has never received special education or related services"); *XXX* v. *Montgomery County Pub. Sch.*, OAH No. MSDE-MONT-OT-05-21215, at 20 (June 24, 2005) (concluding that student who had not previously received special education services from school district was "therefore not entitled to reimbursement for the unilateral private placement for the 2004-2005 school year"), *available at* http://www.marylandpublicschools.org/NR/rdonlyres/60F8031E-5011-4970-8250-97CFA4F81F02/7531/05HMONT21215.pdf, *aff'd sub nom. Lunn* v. *Weast*, 2006 WL 1554895.

with other aspects of the Act and would lead to unfair results. The experience of school districts and school administrators nationwide shows those concerns to be misplaced.

Rather, the 1997 addition of Section 1412(a)(10)(C)(ii) is entirely consistent with the fundamental Congressional preference for public school placements, the overall structure of the Act, and the experience of school districts in implementing its provisions. This amendment merely requires parents to give a school district that believes it can provide a free appropriate public education to a child a reasonable opportunity to attempt to do so. To flip this requirement on its head by requiring school districts to reimburse the cost of private school tuition without first affording the district this opportunity would be to ignore the Act's clear purpose of ensuring children with disabilities have appropriate educational opportunities in public schools.

1. IDEA's History And Fundamental Requirements Show That Appropriate *Public* School Placements Are Preferred.

The principal motivating force behind Congressional enactment of a federal statute governing the education of students with disabilities was to stop the exclusion of disabled students from *public* schools—not to increase their opportunities to attend private schools at public expense. In the 1970s "the majority of disabled children in America 'were either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to drop out.' " *Schaffer* v. *Weast*, 126 S. Ct. 528, 531 (2005) (quoting H.R. Rep. No. 94-332 at 2 (1975)). Congress' findings from the recent 2004 IDEA reauthorization re-emphasize this fact. Before the enactment of IDEA and its precursor, "the educational needs of millions of children with disabilities were not being met because * * * the children were excluded entirely from the public school system and from being educated with their peers." 20 U.S.C. § 1400(c)(2).

The purpose of IDEA was "to reverse this history of neglect" and bring students with disabilities into the mainstream of the public school community. *Schaffer*, 126 S. Ct. at 531. This purpose is readily apparent: "the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the *public education systems* of the States." *Rowley*, 458 U.S. at 189 (emphasis added); *see also id.* at 192 (explaining that in enacting IDEA's precursor, "Congress sought primarily to make *public* education available to handicapped children").

a. The statute's frequent use of the word "public" emphasizes Congress' intent that students with disabilities be educated in public schools. The well-recognized mandate of IDEA is to "ensure that all children with disabilities have available to them a free appropriate *public* education." 20 U.S.C. § 1400(d)(1)(A) (emphasis added); *see also* S. Rep. No. 105-17 (1997) ("critical issue now is to place greater emphasis on * * * ensuring that children with disabilities receive a quality public education"). A free, appropriate public education is one that includes special education and related services provided "at public expense, *under public supervision and direction*, and without charge" and provided in conformity with the IEP developed for the student. 20 U.S.C. § 1401(9) (emphasis added).

Notably, this publicly supervised and directed education need not "maximize each child's potential"; it must rather "be sufficient to confer some educational benefit upon the handicapped child." *Rowley*, 458 U.S. at 198, 200. Parents are always free to choose different educational opportunities for their children at their own expense, should they consider that placement more likely to maximize their child's potential. But the "IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense." *Fort Zumwalt Sch. Dist.* v. *Clynes*, 119 F.3d 607, 612 (8th Cir. 1997). *See, e.g.*, *Doe* v. *Board of Educ. of Tullahoma City Sch.*, 9 F.3d 455,

459-460 (6th Cir. 1993) ("The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student," not that it cede to a student's demand that the school system "provide a Cadillac" solely for [his] use.). School districts cannot realistically provide a "Cadillac" education program to every child with a disability, given the near-constant fiscal constraints they face. *Cf. Arlington*, 126 S. Ct. at 2463 (IDEA does not seek to promote its broad goals "at the expense of fiscal considerations").

b. The Act's "least restrictive environment" ("LRE") mandate, also known as its "mainstreaming" requirement, further underscores IDEA's goal of promoting public school access for children with disabilities. 20 U.S.C. § 1412(a)(5). Through this requirement, the Act incorporates a strong preference that children with disabilities attend schools and classes with children who are not disabled whenever possible—giving rise to a presumption in favor of a child's placement in the public schools. *See, e.g., Independent Sch. Dist. No. 283* v. *S.D.*, 88 F.3d 556, 561 (8th Cir. 1996).

Given the mandate to educate children in the least restrictive environment, a public school is obligated to provide special education and related services in the public schools whenever possible. A school district may only resort to use of a private school to educate a child with a disability when "public educational services appropriate for the handicapped child are not available." *Hessler* v. *State Bd. of Educ.*, 700 F.2d 134, 138 (4th Cir. 1983). The public school has a duty to provide services to the student and include the student in the public school community to the maximum extent practicable.

As a result, only public schools must offer opportunities for maximized participation in the regular curriculum. Students whose parents opt for a private school education—even at one of the rapidly expanding number of private schools marketing themselves as offering expertise or a particularized

focus on disabilities—do not receive this same federally enforceable guarantee.[6] While parents certainly have the right to forfeit the benefits that this guarantee may provide to their children, IDEA should not be interpreted to support at public expense parents who reject the statute's strong preference for mainstreaming.

c. IDEA's preference for public school placements for children with disabilities also is evident in the comprehensive procedural safeguards by which parents can enforce the Act's provisions only against public school districts in order to ensure the delivery of a free appropriate public education for their child. For example, parents have the right to examine all records and to participate in all meetings about the identification, evaluation, and educational placement of their child. If a public school district proposes to change a child's IEP, the parents must receive prior written notice, in their native language, including a description of and explanation for the action proposed or refused, a statement that the parents are protected by procedural safeguards, sources for parents to contact to obtain assistance, a description of other options that were considered, and a list of factors relevant to the decision. If parents object to their child's placement or the services that he or she is receiving, they have the opportunity for an impartial due process hearing, mediation, and a civil action. 20 U.S.C. §§ 1415(a-i). Again, parents may choose to give up these rights, which are intended to ensure that their children receive an appropriate education, but the provision at issue here should not be read to encourage parents to so easily discount the importance of these rights in promoting the overarching purpose of the Act.

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[6] According to the National Center for Educational Statistics, the number of private schools with a special education emphasis grew from 1059 in 1989-90 to 1634 in 2003-04. *Characteristics of Private Schools in the United States: Results from Private School Universe Survey* (2004), *available at* http://www.nces.ed.gov/surveys/pss/.

2. IDEA's Separate Provisions For Children Attending Private Schools At Their Parents' Election Expressly Create No Individual Entitlement To Special Education Services.

IDEA's provisions regarding children placed in private schools by their parents counsel strongly against permitting parents to recover the costs of tuition when their child has never received special education services from the school district. The Act explicitly "does not require" a school district "to pay for the cost of education including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. § 1412(a)(10)(C)(i).[7] The regulations confirm that "[n]o private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.137(a).

Instead, the Act has entirely different, and far less extensive, provisions to support the education of private school students with disabilities. School districts have only a few limited obligations with respect to students with disabilities in private schools. Their principal obligation is to identify those students, so that they and their families can be made aware of the special education services that would be available to them in a public school. *See* 20 U.S.C. § 1412(a)(10)(A)(ii); 34 C.F.R. § 300.451(b).

If students identified through these "child find" activities choose to remain in private school, school districts' responsibility for these students consists primarily of

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[7] Only where a school district cannot or does not offer a free appropriate public education is a publicly funded private school placement authorized by IDEA. *See* 20 U.S.C. § 1401(9); *Burlington*, 471 U.S. at 373-374.

allocating a share of *federal* IDEA funds to their private school education. 20 U.S.C. § 1412(a)(10)(A)(i)(I). The allocated share is determined by comparing the number of disabled students attending private schools in the district to the total number of children with disabilities being educated in the district. *Id.* § 1412(1)(10)(A)(i). Because federal funds represent only a small fraction of the amount needed to provide the services required by IDEA in public schools, this allocation does not guarantee similar service, or even any service, to any particular child with a disability in a private school. As a result, special education services in private schools "are, not surprisingly, less extensive than the services that a disabled child enrolled in a public school is entitled to receive." *Greenland Sch. Dist.* v. *Amy N.*, 358 F.3d 150, 157 (1st Cir. 2004).

In sum, Congress' decision to require parents to attempt a public placement before being eligible for a tuition reimbursement remedy is entirely compatible with the principal focus of IDEA, which indisputably is the education of students with disabilities in public schools.

C. Congress' Limitation Of The Tuition Reimbursement Remedy Also Supports The Collaborative Framework Of The Act.

The "core of [IDEA] * * * is the cooperative process that it establishes between parents and schools." *Schaffer*, 126 S. Ct. at 532. *See also Rowley*, 458 U.S. at 205-206 (Congress gave "parents and guardians a large measure of participation at every stage of the administrative process"). The collaborative decision-making process at the heart of IDEA is undermined when parents do not cooperate in good faith with school districts. Congress' decision to require parents at least to attempt to ensure an appropriate public school placement before they are eligible for private school tuition reimbursement fosters just such good-faith collaboration. *Amici* urge this Court to reiterate here the critical importance of collaboration to the success of IDEA's fundamental goals.

1. IDEA Establishes A Collaborative Framework For Parents And Public Schools To Work In Tandem To Ensure Appropriate Educational Programs For Children With Disabilities.

a. As the Court recently stated in *Schaffer*, the "central vehicle for this collaboration is the IEP process," and parents and guardians "play a significant role" in the process. 126 S. Ct. at 532. From its very outset, for each individual child, the content of an appropriate education is defined collectively in an IEP by a team that includes (among others) the parents and teachers of the student. *See* 20 U.S.C. § 1414(d); *Honig* v. *Doe*, 484 U.S. 305, 311 (1988).

Parents are also involved in an ongoing process of evaluating the implementation of the child's educational program and revising IEPs. The Second Circuit's assumption that parents would have to watch their children languish in inappropriate placements if the plain meaning of the 1997 Amendments were respected thus rests on the false assumption that the IEP process is static. *Frank G.*, 459 F.3d at 372. To the contrary, it is a dynamic process. At least annually—and more often if necessary—the whole IEP team, including the parents, formally reviews whether the plan's goals are being achieved and revises the IEP as needed to address areas in which there has not been sufficient progress. The team also considers the results of reevaluations of the child and other new information about the child and his or her needs, including any such information submitted by the parents. 20 U.S.C. § 1414(d)(3-4).[8] Moreover, after an initial determination has been made, if the parent or school

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[8] The Act imposes other tight timelines on school districts to ensure prompt action. For example, if a parent objects to the IEP, a school district has only ten days to respond. *Id.* § 1415(i)(2)(B). In addition, a full, individual evaluation of whether a child has a disability and the nature of the child's education needs must take place with 60 days of receiving parental consent. *Id.* § 1414(a)(1). In contrast, IDEA establishes no such timelines for action by private schools.

team believes that the amount of service needs to be either reduced or increased, the IEP may be reviewed by the team to consider any circumstances that may require a change. A parent may request such a review of IEP services at any time, as may school staff. In some situations if the change in services is small and the parents and school team are in agreement, the change can occur through the mechanism of an IEP amendment, without even holding a formal meeting. As a result, it is not uncommon for parents and school districts to agree to multiple changes in an IEP or its implementation during a single semester.

The need for such constant monitoring and revision inheres in the fact that developing and implementing an IEP is "an inexact science at best." *Honig*, 484 U.S. at 321 (1988). Such programs have to address a complex variety of factors that affect the learning strengths and weaknesses of an individual child. Because an IEP is sometimes not perfect when first implemented, having a continuous process of collaboration among parents, schools and other professional educators subject to ongoing formal and informal reevaluation and revision is critical. As a result of the continuing collaboration, workable plans are developed around the unique challenges faced by each individual child. Without a serious commitment to that process by both families and schools, it cannot be successful.

Requiring parents to at least try the services recommended by an IEP team before rejecting them in favor of a private placement is entirely consistent with this collaborative model. Likewise, requiring parents to work in good faith with school staff recognizes the reality that it may require an ongoing process of adaptation to provide a free appropriate public education to any given child. By contrast, to allow a parent who has never been inside a public school to walk away from the process and receive a free private education at public expense based on an initial disagreement about educational recommendations described on a piece of paper

would belittle both the cooperative approach of IDEA and the complexity of educating disabled students.

b. IDEA's emphasis on prompt cooperative solutions also imposes obligations on school districts and parents alike to ensure their good faith commitment to a truly collaborative process. The 1997 amendments, for example, included a number of provisions that made some of the procedural duties of parents quite explicit. Requiring cooperation in these smaller ways would make little sense if the Act allowed parents to reject a proposed placement without ever even trying any services offered by the public school district.

The 1997 amendments, for example, added a provision indicating that reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove a child from public school before they do so. 20 U.S.C. § 1412(a)(10)(C)(iii)(I). Therefore, before removing a child from a public school, parents must inform the IEP team that they are rejecting the placement proposed by the team, state their concerns with the proposal, and indicate their intent to enroll their child in a private school at public expense. 34 C.F.R. § 300.148(d). In addition, parents must give the school district written notice of these factors at least ten days prior to removing their child from a public school. *Id.* The reason for this is clear: Without a good faith commitment to the process by all parties, true collaboration in determining the development and implementation of a free appropriate public education would not be possible. *See, e.g., M.S.* v. *Mullica Twp. Bd. of Educ.*, No. 06-533, 2007 WL 1096804 (D.N.J. Apr. 12, 2007) (parents' refusal to cooperate prevented creation of appropriate IEP).

Even before the 1997 amendments made these procedural duties so explicit, several circuits had held that reimbursement for private school tuition depended on the parents cooperating with school authorities in determining the proper placement and educational plan for the child. *See Patricia P.* v. *Board of Educ.*, 203 F.3d 462, 468 (7th Cir. 2000) (listing

cases interpreting pre-amendment IDEA). As the *Patricia P.* court aptly noted, "parents who, because of their failure to cooperate, do not allow a school district a reasonable opportunity to evaluate their disabled child, forfeit their claim for reimbursement for a unilateral private placement." *Id.* at 469. Another circuit similarly has noted that "Even before the IDEA was amended to explicitly require such notice, this court held that dissatisfied parents were required to complain to the public school to afford the school a chance to remedy the IEP before removing their disabled child from the school." *Berger* v. *Medina City Sch. Dist.*, 348 F.3d 513, 523 (6th Cir. 2003). All of these cases are consistent with *Burlington*, which itself recognized that parents could equitably disentitle themselves to tuition reimbursement. 471 U.S. at 373-374.

School districts, too, share an obligation under the statute to attempt in good faith to negotiate workable IEPs—and to agree to private placements when they cannot. And school districts frequently agree to private placements where they are unable to provide an appropriate educational program themselves. In 2005, for example, there were 88,098 students with disabilities educated in private schools at public expense. *See* United States Department of Education, IDEA data, Table 2-5: Number of students ages 6 through 21 served under IDEA, Part B, in the U.S. and outlying areas, by disability category and educational environment, Fall 1996 through Fall 2005, *available at* https://www.ideadata.org/tables29th/ar_2-5.htm. The overwhelming majority of these placements were ones that school districts agreed were appropriate to ensure the child in question received the education mandated by IDEA. School districts thus voluntarily expend hundreds of millions of dollars in state and local revenue on agreed private placements—which occur when the collaborative process established by the Act is operating as it is intended.

c. As this Court has recognized, the collaborative emphasis of IDEA is present even in its dispute-resolution mechanisms, which promote timely and amicable resolutions wherever possible. *See Schaffer*, 126 S. Ct. at 535. The Second Circuit, however, misunderstood these mechanisms when it expressed concern that interpreting Section 1412(a)(10)(C)(ii) consistent with its plain language would force parents of students with disabilities simply to acquiesce to inappropriate placements in order to preserve their right to seek reimbursement for a private school placement. *See Frank G.*, 459 F.3d at 372. At a threshold level, parents' procedural rights are designed to ensure parents are involved in the process of developing a timely, appropriate placement for their child from the outset. But even if parents disagree with the placement recommendation that results from this collaborative process, they have many options besides simply acquiescing in what they feel to be an inappropriate placement for an extended period of time. In fact, parents' extensive procedural rights prevent this result.

The Act establishes procedures to ensure a prompt resolution of disputes, in the event that the collaborative approach of the IEP process is unsuccessful. Under IDEA, school districts are required to respond to parents' complaints within a short timeframe. Indeed, since the adoption of Section 1412(a)(10)(C)(ii), Congress has tightened the deadlines applicable to public school districts. For example, when a school district receives notice of a due process complaint, it has only 10 days to explain to the parents why it has proposed or refused to take the action at issue, including describing the other options that were considered, why they were rejected, and the evaluation procedures, assessments, records, or reports that were used to make the decision. 20 U.S.C. § 1415(c)(2)(B)(i)(I). Within 15 days, the school district must convene a meeting with the parents and relevant IEP team members, at which the parents and child are given an opportunity to discuss their complaint and try to resolve the dispute amicably. *Id.* § 1415(f)(1)(B). If the complaint is

not fully resolved within 30 days, a due process hearing must be scheduled. *Id.* The Act also provides parents and guardians with a right to publicly funded, confidential mediation. *Id.* § 1415(e). Finally, if the parents are not successful in resolving their concerns amicably or through a due process hearing, they may bring a civil action within 90 days of the decision. *Id.* § 1415(i)(2)(B).

The limitation on tuition reimbursement also does not leave parents whose children have never previously received services without relief should an IEP ultimately be found inadequate to offer a free appropriate public education. Hearing officers have extensive remedial authority beyond tuition reimbursement, all of which remains available to parents whose children have never received services. Hearing officers often, for example, order specific revisions to an IEP. *See* Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act*, 58 Admin. L. Rev. 401, 410 & n.60 (2006). Hearing officers also have invoked their equitable powers to order training of school district personnel and to order school districts to hire an outside consultant. *Id.* at 417-419.

Perhaps most importantly, hearing officers can—and frequently do—rely on their equitable powers to craft an award of compensatory education appropriate to remedy the prior receipt of insufficient services. *See, e.g., Evanston Cmty. Consol. Sch. Dist. Number 65* v. *Michael M.*, 356 F.3d 798, 803 (7th Cir. 2004); *Ridgewood Bd. of Educ.* v. *N.E. ex rel. M.E.*, 172 F.3d 238, 250 (3d Cir. 1999). The courts of appeals have upheld the right of courts and hearing officers to award compensatory relief, finding this form of relief fits within the "broad discretion" to craft "appropriate relief" announced by this Court in *Burlington* and *Carter*. As the Fourth Circuit explains, "[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a [hearing officer or] court to remedy what might be termed an

educational deficit created by an educational agency's failure over a given period of time to provide a FAPE [free appropriate public education] to a student." *G. ex rel. RG* v. *Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir. 2003). The D.C. Circuit further emphasizes that this equitable remedy should be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid ex rel. Reid* v. *District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005).

2. Allowing Parents To Resort To Private School Placements Before Working With A Public School District Contravenes IDEA's Collaborative Framework.

When Congress decided in 1997 that school districts should have a realistic opportunity to develop and implement an IEP that will provide a free appropriate public education, it was acting in a manner entirely consistent with the pre-existing collaborative framework of the Act. Indeed, if parents are allowed unilaterally to reject a public education and resort to a private school without even trying the proposed IEP—let alone giving the teachers and student a chance to make it work—that cooperative process would be undermined.

This Court has repeatedly held that governmental and administrative agencies are entitled to the presumption of regularity, *i.e.*, the assumption that public officials act lawfully and in good faith. *See United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001) (noting that "a presumption of regularity attaches to the actions of Government agencies"); *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) ("courts presume that [public officers] have properly discharged their official duties") (quoting *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)). Since "[b]y and large, public education in our Nation is committed to the control of state and local authorities," public school officials, like other governmental officials, are entitled to this

presumption. *Goss* v. *Lopez*, 419 U.S. 565, 578 (1975) (quoting *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968)).

IDEA recognizes this presumption of good faith and "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children." *Schaffer*, 126 S. Ct. at 531 (quoting *Rowley*, 458 U.S. at 183). Educators are especially entitled to this presumption of regularity and good faith in their work with parents to develop an initial IEP for a student, especially since these educators know the ins and outs of the programs they offer much better than parents who have never tried them—or worse have never observed or met with a single teacher or administrator who implements them. Once public school staff develop an IEP, the presumption of good faith applies, and the IEP is presumed to be an appropriate method of ensuring that a child with disabilities is given the support necessary to succeed in the classroom. *See id.* at 537 (holding that a party challenging an IEP bears the burden of showing that the IEP was improper).

With the 1997 amendments to IDEA, Congress further reinforced the presumption of good faith that is due to public school officials. Many of these amendments, including the one at issue here, are designed to ensure that public school teachers and staff have the opportunity to work collaboratively with parents to craft an appropriate IEP before parents unilaterally place their child in a private school and seek tuition reimbursement. Since "IDEA relies heavily upon the expertise of school districts to meet its goals," public school officials should be given the chance to exercise their expertise and perform their duties. *Id.* at 536.

Permitting parents to seek private school tuition reimbursement before giving public school districts any opportunity to serve their children would undermine the presumption of good faith to which public school officials are entitled. The 1997 amendments to IDEA preserve the

presumption of good faith. Thus, the courts "should presume that public school officials are properly performing their difficult responsibilities under this important statute," and school districts should be given the opportunity to prepare and implement an IEP for a student before a parent may disregard the public schools, opt for a private school, and seek reimbursement. *Id.* at 537 (Stevens, J., concurring).

Under *Burlington* and before 1997, parents had no obligation to give a public placement a fair shake; they could proceed straight to their tuition reimbursement claim. Congress put an end to that. While "IDEA mandates individualized appropriate education for disabled children, it does not require a school district to provide a child with the specific educational placement that [his] parents prefer." *T.F.* v. *Special Sch. Dist. of St. Louis County*, 449 F.3d 816, 821 (8th Cir. 2006) (quotation omitted).

Unilateral refusal to try an IEP means that school officials are never given the opportunity to make (or refuse to make) changes depending on how a child responds to the IEP developed. While there is no guarantee that a proposed IEP will always accommodate every child, the school district should have the opportunity—and to an extent has a duty to try—less restrictive alternatives than private placements. *See, e.g., id.* at 821 ("district should have had the opportunity, and to an extent had the duty, to try these less restrictive alternatives before recommending a residential placement"). And if a problem with the IEP becomes apparent, school districts need to be able to investigate and respond to the problem—before being saddled with tens of thousands of dollars in tuition reimbursement. *See M.C. on behalf of J.C.* v. *Central Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996) (district "may not be able to act immediately to correct an inappropriate IEP; it may require some time to respond to a complex problem").

When parents unilaterally place their child in a private school before implementation of a collaboratively developed IEP, and then pursue a due process hearing, school districts are also denied the ability to litigate the case on an even footing with the parents. For example, the hearing officer is forced to evaluate in a vacuum whether the IEP would have been appropriate, because the child has no experience with the placement. This necessitates an abstract inquiry. Although an IEP is supposed to be judged prospectively as of the time it was developed, in many cases, the parents point precisely to how the child is doing in the private placement as some sort of "proof" of their speculation that the public placement was not sufficient. In addition to encouraging improper "Monday morning quarterbacking" of the IEP developed by the public school, the parent's "proof" of private school success is meaningless in the absence of having tried the public placement. A school district has much more limited—if any—means of defending its placement proposal when it is embodied only in a piece of paper and the student has never tried it.

Parents and their attorneys could then sit back in hopes that the school district members of an IEP team would somehow misjudge some aspect of a child's educational needs—or at least that the parents and their attorneys would be able to convince a hearing officer or administrative law judge that the school district did, a process made easier by asking the hearing officer to compare the school district's proposed program to the private school's actual program (which often costs two, three, or four times as much). This would damage the collaborative nature of the IEP process.

IEPs in those circumstances would not be prepared by cooperative teams of parents and educators, as IDEA envisions, but instead would become mere adversarial antecedents to litigation by parents with little or no interest in pursuing a public education for their child in the first place. One case that highlights this problem is *Carmel Central*

School District v. *V.P. ex rel. G.P.*, 373 F. Supp. 2d 402 (S.D.N.Y. 2005). In that case, the parents of a fourteen-year-old girl who had never attended public school unilaterally enrolled her in a private school—and then came to Carmel Central School District for the express purpose of requesting an IEP placing their child at that private school and threatening to seek tuition reimbursement if the school did not agree with them that the only proper placement for their daughter was at that private school. The parents, who were new to Carmel Central School District and whose daughter had never attended public school, provided the school with inaccurate and incomplete information about their daughter's background and needs. They offered "superficial and *pro forma*" cooperation in the development of an IEP, and they "refused to observe or familiarize themselves with the public school classes that the [school district] thought might be appropriate for [the child] or to contact the administrators who would have been involved in working with the girl in the public school." *Id.* at 416. Because the parents "never had the slightest intention of allowing the child to be educated in the public school, [they] did everything possible so that they could frustrate a timely review of [her] condition before they re-enrolled her in [the private school]." *Id.*

The district court ruled against the parents' request for tuition reimbursement as a matter of law. It looked at the 1997 tuition-reimbursement provision and recognized that Congress did not intend tuition reimbursement as a reward for parents who "go[] through the motions of a [IEP] process while harboring not the slightest intention of doing anything other than keeping" their child at a private school. *Id.*

This Court should do the same. Parents should not be permitted to access a publicly funded private school education without engaging in any good faith effort to find an appropriate public school placement for their child. To rule in favor of Respondent—and against school districts like Carmel Central who are at an inherent disadvantage if

parents do not genuinely engage in what is meant to be a collaborative process—would only encourage more parents to follow suit.

It is unfair to allow parents to merely pretend to cooperate during the development of an IEP. Such a charade is a waste of valuable time and resources if the parents do not bring a good faith interest in the public education process. Congress expressly sought to prevent this result by limiting the situations when tuition reimbursement might be "appropriate" under *Burlington* to those in which parents have given the public schools a genuine opportunity to serve their child and the public schools have failed to do so. Upholding the Second Circuit's decision would only encourage private-school parents of children with disabilities to refrain from articulating their precise concerns until it is too late for the school district to resolve them.

D. Permitting Reimbursement For Private School Placements Made Before The Child Ever Receives Special Education Services From A Public School Also Would Increase Litigation Costs And Divert Resources From Education.

Litigation costs under IDEA are often prohibitive for school districts. *See, e.g.*, Nanette Asimov, *Extra-special Education at Public Expense*, S.F. Chron., Feb. 19, 2006 at A1 (school district paid $239,044 to defend its position that autistic student did not need horseback riding and swimming pool therapy). Congress is aware of this fact, and has been trying to rein in these costs. As a Senate Report from the 1997 amendments makes clear, "[t]he growing body of litigation surrounding IDEA is one of the unintended and costly consequences of this law." S. Rep. No. 104-275 at 85 (1996); *see also, e.g., id.* (noting that "teachers, administrators, and principals, on the whole, act in good faith to implement what is an exceptionally complex and procedural law" and that " IDEA is already one of the largest

under funded Federal mandates; it is wrong for courts to impose even greater financial burdens on these financially strapped districts as punishment for trying to do their job."); H.R. Rep. No. 108-77 at 85; 150; 150 Cong. Rec. S5250, S5337 (daily ed., May 12, 2004)(statement of Sen. Corzine); 149 Cong. Rec. H3458, H3470 (daily ed., Apr. 30, 2003)(statement of Rep. McKeon).

Ruling that *Burlington* and *Carter* are not limited by Section 1412(a)(10)(C)(ii) would only result in a continued flood of private school parents seeking to play in a tuition-reimbursement lottery, regardless of their interest (or lack thereof) in securing a public education for their children. It would place school districts nationwide, including many small and financially strapped districts, in the untenable position of being forced to choose between an expensive private school placement on one hand and costly litigation on the other. IDEA was never intended to create such a dilemma for school districts or to offer such windfalls to parents who prefer private schools. The reality for school districts is that the Court's holdings in *Burlington* and *Carter* exploded the number of tuition reimbursement cases that school districts must litigate, mediate, or settle.

In the last decade, the number of private placements has increased at more than *twice* the pace that the number of special education students has increased. According to the United States Department of Education, there were 88,098 students with disabilities educated in private schools at public expense in 2005. From 1996-2005, while the number of children ages 6-21 who receive special education and related services for all disabilities rose by 17% across the Nation, the number of children in publicly funded private placements rose by over 34%. *See* United States Department of Education, IDEA data, Table 2-5, *supra*.[9]

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[9] For example, last year approximately 7,445 disabled students attended private schools in New York at public expense because

Requiring a student who has never received special education and related services from the public school to try the public school placement that results from the collaborative IEP process ensures that the parents and school district carry the cooperation they began in developing the IEP to the next stage—implementation. This continued collaboration may include monitoring and training for staff, teachers, and administrators, *see, e.g.*, *Bradley* v. *Arkansas Dep't of Educ.*, 443 F.3d 965, 975 (8th Cir. 2006), *Lewisville Indep. Sch. Dist.* v. *Charles W*, 81 Fed. Appx. 843, 844 (5th Cir. 2003); adjusting the level of services, *see Dong* v. *Board of Educ. of Rochester Cmty. Sch.*, 197 F.3d 793 (6th Cir. 1999); adjusting the type of services, *see Nack* v. *Orange City Sch. Dist.*, 454 F.3d 604 (6th Cir. 2006); and responding to parental concerns and input, *see Alex R.* v. *Forrestville Valley Cmty. Unit Sch.*, 375 F.3d 603, 610 (7th Cir. 2004). Congress' decision to require continued collaboration through implementation of the IEP—before allowing a parent to opt out of the public school placement and unilaterally reject that placement as inadequate—furthers IDEA's overarching goal of ensuring all children have access to a *public* education that is appropriate.

CONCLUSION

For the foregoing reasons, as well as those contained in the petitioner's brief, the Second Circuit's decision should be reversed.

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the school district agreed that it could not provide them with a free appropriate public education in one of its public schools. Joseph Berger, *Private Schooling for the Disabled and the Fight Over Who Pays*, N.Y. Times, Mar. 31, 2007 at A9. By contrast, only 210 students requested private school tuition reimbursement in 1995. *See* Yilu Zhao, *Rich Disabled Pupils Go to Private Schools at Public Expense*, N.Y. Times, Apr. 17, 2002 at B7; *see also* Mary Ellen Egan, *A Costly Education*, Forbes, Apr. 9, 2007 at 88 (noting the number of due process hearing requests in New York City jumped by 33% from 2000-2006).

Respectfully submitted,

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BOARD OF EDUCATION OF
THE CITY SCHOOL DISTRICT OF
THE CITY OF NEW YORK,

Petitioner,

v.

TOM F., on BEHALF of GILBERT F., a MINOR CHILD,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit**

BRIEF OF *AMICUS CURIAE* NEW YORK STATE SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The New York State School Boards Association, Inc. ("NYSSBA") is a not-for-profit membership organization incorporated under the laws of the State of New York. Its membership consists of approximately ninety-two percent (92%) of all public school districts in New York State. Pursuant to Section 1618 of New York's Education Law, NYSSBA has the responsibility of devising practical ways and means for obtaining greater economy and efficiency in the administration of the affairs and projects of New York's public school districts. NYSSBA often appears as *amicus curiae* before both federal and state court proceedings involving constitutional and statutory issues affecting public schools, including the education of children with disabilities, and indeed did so in the court below. NYSSBA fully supports the rights of disabled children. However, NYSSBA has a significant interest in ensuring that its members are not subjected to obligations related to the education of children with disabilities that exceed those specifically set forth in the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* ("IDEA"). Special education services are costly[2], and federal financial

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[1] The parties consented to the filing of this brief, and copies of the parties' written consents have been filed with the Clerk of the Court. This brief was not authored in any part by counsel for either party, and no person or entity other than the *Amicus*, its members or counsel made a monetary contribution to the preparation or submission of this brief.

[2] An examination of the most recent available data contained within The New York State School Report Card that school districts in New York must submit to the New York State Education Department reveals that during the 2003-04 school year, the average expenditure of all public schools in New York State for special education was $17,667 as compared to $8,177 for general education students. During the 2004-05 school year those figures increased to $19,320 for special education

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assistance made available by the IDEA is insufficient to cover the cost of special education. NYSSBA members, like many other school districts across this country, regularly expend often scarce local financial and other resources to fully comply with their IDEA obligations, which frequently limit the type of educational choices they can afford to offer their students, including children with disabilities. A decision by this Court in favor of the respondent would impose an added financial liability on school districts that would limit the educational choices NYSSBA members could afford to offer all of their students.

SUMMARY OF THE ARGUMENT

The issue before this Court is whether 20 U.S.C. §1412(a)(10)(C)(ii) limits the availability of tuition reimbursement as a remedy under the IDEA only to parents of children with disabilities "who previously received special education and related services under the authority of a public agency. . . ." When asked the same question, the U.S. Court of Appeals for the Second Circuit, whose decision in *Board of Educ. of City Sch. Dist. of City of New York v. Tom F.*, 193 Fed. Appx. 26 (2nd Cir. 2006), is on appeal herein, answered no.

This Court first recognized a parent's right to tuition reimbursement under the IDEA in its 1985 decision in *Burlington Sch. Comm. v. Department of Educ.*, 471 U.S.

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and $8,787 for general education students. The most recent student count data available from the New York State Education Department further indicates that on December 1, 2005 there were a total of 407,000 school age children ages 4-21 receiving special education programs and services.

359 (1985), based on the statute's grant of authority to courts to award "such relief as the court determines is appropriate" under section 1415(e)(2), currently codified at 20 U.S.C. §1415(i)(2)(C)(iii). It later expanded this right in *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993), ruling that a parent's choice of a private school that does not meet state educational standards does not impede the ability to obtain such relief.

In the time since, Congress has reauthorized the IDEA twice, first in 1997 and, more recently, in 2004. During the 1997 reauthorization, Congress amended the IDEA to explicitly provide a statutory right to reimbursement (20 U.S.C. §1412(a)(10)(C)). Nothing in the 2004 reauthorization materially affects that right.

The language at issue herein first appeared in the 1997 version of the IDEA within a paragraph entitled "Children in Private Schools" (20 U.S.C. §1412(a)(10)). It is part of a subparagraph entitled "Payment For Education Of Children Enrolled In Private Schools Without Consent Of Or Referral By The Public Agency" (20 U.S.C. §1412(a)(10)(C)). That subparagraph further addresses the topics of "Reimbursement For Private School Placement" (20 U.S.C. §1412(a)(10)(C)(ii)), and "Limitation On Reimbursement" (20 U.S.C. §1412(a)(10)(C)(iii)). The 2004 reauthorization did not change this statutory structure.

The plain text of the contested language and its contextual framework make clear that the previous receipt of special education and related services under the authority of a public agency is a condition precedent to the recovery of reimbursement as a remedy under the IDEA when a school district fails to make a FAPE available. The limitation constitutes a proper exercise of congressional

authority and discretion to determine who may benefit from its laws.

Even if the language of 20 U.S.C. §1412(a)(10)(C)(ii) is deemed to be ambiguous, further support for a literal interpretation thereof is found in the history of its incorporation into the IDEA. That history clearly establishes a congressional intent, continued in the 2004 reauthorization, to restrict and refine the IDEA rights of children unilaterally enrolled by their parents in private school, and the rights of their parents.

The decision of the Second Circuit in this case should be reversed.

ARGUMENT

I. Under The Plain Language Of 20 U.S.C. §1412(a)(10)(C)(ii) A Parents' Right To Reimbursement Under The IDEA Depends On Both A School District's Failure To Make A FAPE Available And Their Child Having Previously Received Special Education And Related Services Under The Authority Of A Public Agency.

The IDEA provisions that set forth a parent's statutory right to reimbursement under that law read, in relevant part, as follows:

> (C) PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY

> (i) IN GENERAL – Subject to subparagraph (A), this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child in such private school or facility.
>
> (ii) REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT – If the parents of a child with a disability, **who previously received special education and related services under the authority of a public agency**, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment (20 U.S.C. §1412(a)(10)(C)(i),(ii)) (emphasis added).

The bolded text highlights the specific language in controversy. First introduced during the 1997 reauthorization of the IDEA, the above quoted provisions were unchanged by the 2004 reauthorization.

Last year, this Court explained in *Arlington Central Sch. Dist. Board of Educ. v. Murphy*, that it must be presumed the language of the IDEA expresses what Congress intended it to say, and means what it says (126 S.Ct. 2455, 2459 (2006)). This Court has also held that, generally, statutory words are to be given the natural meaning commonly attributed to them (*see, e.g., Caminetti v. United States*, 242 U.S. 470, 485-86 (1917)). An

exception would apply if the plain language of a statute is susceptible to more than one meaning (*Id.* at 485), or if the disposition required by the statutory language is absurd (126 S.Ct. at 2459). Otherwise, the policy choices articulated by Congress in the language of a statute must be upheld, regardless of their wisdom (*Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548-49 (1983); *Harris v. McRae*, 448 U.S. 297, 326 (1980)).

According to the Second Circuit, whose decision is the subject of the appeal before this Court, the language of 20 U.S.C. §1412(a)(10)(C)(ii) is not only ambiguous but also inconsistent with the overarching purpose of the IDEA and other provisions of the statute. For the reasons that follow, the *Amicus* respectfully disagrees and urges this Court to reverse the Second Circuit's decision and enforce the plain language of the statute.

A. The Language Of 20 U.S.C. §1412(a)(10)(C)(ii) Is Not Ambiguous.

According to the Second Circuit, the language at issue herein is ambiguous because it "does not say that tuition reimbursement is only available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents whose child had not previously received special education and related services" (*Frank G. v. Board. of Educ. of Hyde Park*, 459 F.3d 356, 368 (2nd Cir. 2006)).[3] However, the absence of

[3] On appeal before this court is the Second Circuit's ruling in *Board of Educ. of City School Dist. of City of New York v. Tom F.*, 193 Fed. Appx. 26 (2006). However, as indicated in that decision, the basis for the Second Circuit's *Tom F.* ruling is articulated in a separate

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such restrictive language does not preclude enforcement of the plain language of 20 U.S.C. §1412(a)(10)(C)(ii) (*see Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7-8 (2000)). That would be the case, particularly where, as here, the natural reading of a statutory provision is plainly discernable from both the common meaning of its words and its contextual features (*Id.*).

First incorporated into the IDEA during the 1997 reauthorization of the statute, the contested language appears in a subparagraph entitled "Payment For Education Of Children Enrolled In Private Schools Without Consent Of Or Referral By The Public Agency," (20 U.S.C. §1412(a)(10)(C)). Moreover, it is part of a paragraph that expressly sets forth the rights of "Children in Private Schools" (20 U.S.C. §1412(a)(10)).

It is without question that the statutory framework within which Congress incorporated the statutory language at issue herein defines both the right of children in private schools to receive IDEA services and the right of parents who unilaterally place their children in private school to obtain tuition reimbursement as a remedy under the statute. 20 U.S.C. §1412(a)(10)(C)(ii) must be read within this larger structure, rather than in isolation. From that view, the language at issue herein makes clear that a parent's right to recover reimbursement as a remedy under the IDEA depends both on a district's failure to make a FAPE available, and their child's previous receipt

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decision by that court entitled *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356 (2nd Cir. 2006), which also required the Second Circuit to interpret 20 U.S.C. §1412(a)(10)(C)(ii).

of special education and related services under the authority of a public agency.

B. The Limitation Imposed By 20 U.S.C. §1412(a)(10)(C)(ii) On A Parents' Right To Reimbursement Is A Proper Exercise Of Congressional Authority.

As this Court has observed on more than one occasion, the IDEA is a funding statute (*Arlington Central Sch. Dist. Board of Educ. v. Murphy*, 126 S.Ct. at 2458; *Schaffer v. Weast*, 126 S.Ct. 528 (2005)). It provides federal financial assistance for states and local educational agencies that comply with various requirements designed to secure a FAPE for children with disabilities (*Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 179 (1982); *see* 20 U.S.C. §§1412; 1413). Some of those requirements establish rules for the identification, evaluation and educational placement of children with disabilities (20 U.S.C. §1414), and provide for procedural safeguards that protect the rights of disabled children and their parents under the statute (20 U.S.C. §1415).

It is without dispute that Congress has the authority to set and revise the terms upon which it will make federal financial assistance available under its various laws, including the IDEA (126 S.Ct. at 2459). Furthermore, it is within the discretion of Congress to determine who will benefit from the "largesse" of its laws (*see*, *Regan v. Taxation with Representation of Washington*, 461 U.S. at 548-49; *Harris v. McRae*, 448 U.S. at 326).

The limitation on a parent's right to reimbursement at issue herein is but one of several changes first instituted

by Congress during the 1997 reauthorization that redefined the IDEA rights of children attending private school. For example, prior to the 1997 reauthorization, the IDEA addressed the subject of children with disabilities in private schools in a subsection that set out the REQUISITE FEATURES that needed to be included in the plan that states meeting the IDEA's eligibility requirements must submit to the Secretary of Education (*former* 20 U.S.C. §1413(a)). One of the paragraphs in that subsection required that states:

> (4) Set forth policies and procedures to assure –
>
> (A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and
>
> (B) that –
>
> (i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State, and

> (ii) in all such circumstances, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies (*former* 20 U.S.C. §1413(a)(4)).

The 1997 reauthorization removed the above provisions and placed them in a new section regarding state eligibility requirements, and incorporated them with some changes within a new paragraph entitled "Children in Private Schools" that remains codified at 20 U.S.C. §1412(a)(10) under the current IDEA as reauthorized in 2004. Whereas, the 1997 reauthorization left the text of *former* section 1413(a)(4)(B) virtually unchanged, it amended the text of *former* section 1413(a)(4)(A) so as to impose limitations that restricted the availability of IDEA services to students unilaterally enrolled by their parents in private school to a proportionate share of funds made available by the IDEA. Those amendments read as follows:

> (A) CHILDREN ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS – (i) IN GENERAL – To the extent consistent with the number and location of children with disabilities in the State who are enrolled **by their parents** in private elementary and secondary schools, provision is made for the participation of **those** children in the program assisted or carried out under this part by providing for such children special education and related services **in accordance with the following requirements, unless the Secretary has arranged for services for those children under subsection (f):**

> **(I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.**
>
> **(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law** (*former* 20 U.S.C. §1412(a)(10)(A)(i)) (emphasis added).

From its early beginnings, the IDEA reflects a history of statutory evolution and adjustment to congressional policy regarding the education of children with disabilities (*see*, *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. at 191-92). At every step, that evolution has been informed by specific findings set forth in the statute itself, and the national experience regarding implementation of previous requirements (*see*, S. Rep. 105-17, *5 (1997 WL 244967); H.R. Rep. 105-95 (1997 U.S.C.C.A.N. 78, 82)). Each of its reauthorizations has changed prior IDEA requirements.

The limitation on the availability of IDEA services for children in private school and the limitation on a parent's right to reimbursement at issue are part of that evolution. They constitute a departure from prior law, but also represent the articulation of congressional policy regarding the benefits available under the IDEA and the recipients of those benefits. That policy is within the discretion of Congress and must be upheld irrespective of its wisdom (*Regan v. Taxation with Representation of Washington*, 461 U.S. at 548-49 (1983); *Harris v. McRae*, 448 U.S. at 326 (1980)).

C. Enforcement Of The Plain Language Of 20 U.S.C. §1412(a)(10)(C)(ii) Will Not Produce An Absurd Result.

According to this Court, a literal application of otherwise plain statutory language will not be appropriate if the disposition required by its terms is deemed absurd because it "will produce a result demonstrably at odds with the intentions of the drafters" (*United States v. Ron Pair Enterprises, Inc.* 489 U.S. 235, 242 (1989)). However, that is not the case herein. As set forth above, 20 U.S.C. §1412(a)(10)(C)(ii) is part of a larger statutory framework defining the IDEA rights of children in private schools and their parents. Its enactment constituted a proper exercise of congressional authority and discretion regarding who may benefit from federal laws, and the terms and conditions applicable to the receipt of those benefits.

According to the Second Circuit a literal application of 20 U.S.C. §1412(a)(10)(C)(ii) would force parents to acquiesce to an inappropriate placement to preserve their right to reimbursement. However, as noted by the district court in this case, the statutory language at issue herein initially "ensures that a parent's rejection of a public school placement is not based on mere speculation as to whether the recommended school placement would have been appropriate" (*Board of Educ. of City Sch. Dist. of City of New York v. Tom F.*, 2005 WL 22866, at *3 (S.D.N.Y. Jan. 4, 2005)). As discussed below, the legislative history of 20 U.S.C. §1412(a)(10)(C)(ii) supports the district court's conclusion. Its adoption was part of an effort by Congress to resolve the problem of escalating litigation (S. Rep. 105-17, *13 (1997 WL 244967); H.R. Rep. 105-95 (1997 U.S.C.C.A.N. 78, 90)). Nothing precludes Congress from addressing within the statute fiscal considerations

associated with the implementation of the IDEA (*see Arlington Central Sch. Dist. Board of Educ. v. Murphy*, 126 S.Ct. at 2463).

II. The History Of 20 U.S.C. §1412(a)(10)(C)(ii) Supports Enforcement Of Its Plain Language.

As set forth above, 20 U.S.C. §1412(a)(10)(C)(ii) was first incorporated into the IDEA during the 1997 reauthorization of the statute. From the beginning, primary concern of the IDEA has been to ensure the availability of a FAPE to all children with disabilities. But the 1997 reauthorization marked a change in emphasis directed at ensuring greater access to the general curriculum and that efforts to educate disabled children are effective.

As indicated by accompanying Senate and House Reports, Congress viewed the 1997 reauthorization "as an opportunity to review, strengthen, and improve IDEA to better educate children with disabilities and enable them to achieve a quality education . . . " (S. Rep. 105-17, *5 (1997 WL 244967); H.R. Rep. 105-95 (1997 U.S.C.C.A.N. 78, 82)).

One of the ways in which the 1997 reauthorization was expected to realize that opportunity was by "assisting educational agencies in addressing the costs of improving special education and related services to children with disabilities . . . " (*Id.*). Another was "to clarify the responsibility of public school districts to children with disabilities who are placed by their parents in private schools" and yet another to "resolve a number of issues that [had] been the subject of an increasing amount of litigation in the last few years" (S. Rep. 105-17, *13 (1997 WL 244967); H.R. Rep. 105-95 (1997 U.S.C.C.A.N. 78, 90)).

It is beyond dispute that, ever since this Court's *Burlington* decision, litigation over tuition reimbursement has comprised a significant number of special education cases. Neither can it be disputed that the cost of litigation in addition to the actual reimbursement of tuition can significantly drain the limited resources available to school districts to ensure that children with disabilities not only have access to a FAPE, but also can achieve a quality education. Thus, it was appropriate for Congress to address these problems within the IDEA itself. As this Court has indicated, "[t]he IDEA ... does not seek to promote [its over-arching] goals at the expense of all other considerations, including fiscal considerations" (*Arlington Central Sch. Dist. Board of Educ. v. Murphy*, 126 S.Ct. at 2463). The contested language was specifically designed to curtail a proliferating cost problem that impedes a school district's ability to maximize the use of limited federal funds needed to adequately educate disabled children.

The consequences of enforcing the plain language of 20 U.S.C. §1412(a)(10)(C)(ii) might be viewed by some as severe. But they are no less harsh than those imposed by contemporaneously enacted limitations on the right of children with disabilities unilaterally enrolled by their parents in private schools to participate in programs assisted or carried out under the IDEA.

Notwithstanding the IDEA's overarching goal of ensuring that all children with disabilities have access to a FAPE, the 1997 reauthorization provided at 20 U.S.C. §1412(a)(10)(A)(i) that the amount of IDEA funds school districts must expend for the provision of services to children unilaterally enrolled by their parents in private school is limited to a proportionate share of those funds. Federal IDEA regulations adopted to implement the 1997

reauthorization further specified that children with disabilities unilaterally enrolled by their parents in private school have no individual right to some or all of the services they would receive if enrolled in a public school (*former* 34 C.F.R. §§300.454(a)(1); 300.455(a)(2),(3)). Neither do they have an individual right to a due process hearing to challenge any of the services the public school actually offers (*former* 34 C.F.R. §300.457). Instead, decisions about which children will receive services and what services will be provided to them are made by public school officials in consultation with representatives of private school children with disabilities (*former* 34 C.F.R §300.454(a)(2), (b), (c)). Complaints about the services provided are filed with the state educational agency (*former* 34 C.F.R. §300.457). The 2004 reauthorization and its implementing regulations continue the 1997 statutory and regulatory scheme (20 U.S.C. §1412(a)(10)(A)(iii); 34 C.F.R. §§300.130-300.150).

Thus, it is clear that the history of its incorporation into the IDEA requires the statutory language at issue herein be upheld and enforced. The decision of the Second Circuit should be reversed. A contrary result would contravene the plain language of the statute and the intent of its drafters. It also would negatively affect the ability of school districts to provide appropriate educational opportunities to all of their students.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit should be reversed.

Respectfully submitted,

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May, 2007

(6)

5/14/07

No. 06-637

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F., ON BEHALF OF GILBERT F., A MINOR CHILD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the holding of the court of appeals that IDEA permits tuition reimbursement where a child has not previously received special education from a public agency contradicts the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii).

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] Legal issues concerning the provision of primary and secondary education are of singular fiscal and social importance to *amici*. Public education is the largest expenditure of state and local governments and is central to the quality of life and productivity of the citizenry and to the future of the nation.

The judgment of the court of appeals seriously disrupts the planning and implementation of special education programs for the millions of disabled children served by our public schools. By ruling that parents like respondent are free to seek reimbursement for private school tuition without seriously engaging in a cooperative process with public school special education experts as required by IDEA, the holding below will divert funds from achieving the statute's purpose – effective special education of millions of disabled children. It will waste IDEA money on IEPs that will never be implemented and whose crafting will be followed by costly litigation to obtain private school tuition reimbursement and attorney's fees.

As this Court has repeatedly noted, it is Congress' intent that "IDEA's promise of a 'free appropriate education' for disabled children would normally be met by . . . education in the regular public schools or in private schools chosen jointly by school officials and parents." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12 (1993). Because of the importance to *amici* and their members of ensuring that

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[1] The parties have consented to the filing of this brief, and their letters of consent filed have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Congress' goals for the education of the nation's disabled children are honored, *amici* submit this brief to assist the Court in its resolution of the case.

STATEMENT

1. IDEA was enacted in 1970 and substantially amended in 1975, a time when "the majority of disabled children in America were either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 51-52 (2005) (citation omitted). The 1975 amendments were a reaction to two landmark cases that had remedied the outright exclusion of disabled children from the public schools of Pennsylvania and the District of Columbia. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 192-93 (1982) (citing *Penn. Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (1972); *Mills v. Bd. of Ed. of Dist. of Columbia*, 348 F. Supp. 866 (D.D.C. 1972)).

Congress' determination to put an end to the exclusion of disabled children from public schools is reflected both in the legislative history of the Act and its language. For example, as this Court has noted, Senator Cranston expressed the concern that "millions of handicapped children . . . 'are largely excluded from the educational opportunities that we give to our other children.'" *Rowley*, 458 U.S. at 191 n.13 (quoting 121 Cong. Rec. 19494, 19502 (1975)). And Representative Mink deplored the fact that "handicapped children . . . are denied access to public schools because of a lack of trained personnel." *Id.* (quoting 121 Cong. Rec. at 23708).

Thus, "the face of the statute evinces a congressional intent to bring previously excluded handicapped children into public education systems of the States." *Id.* at 189. "Congress intended that IDEA's promise of a 'free appropriate public

education' for disabled children would normally be met by . . . education in the regular public schools or in private schools chosen jointly by school officials and parents." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12 (1993). The central role of public schools in educating disabled children is also evidenced in the "mainstreaming" provision of the Act, which requires that "'to the maximum extent appropriate' [States] must educate handicapped children 'with children who are not [handicapped].'" *Rowley*, 458 U.S. at 181 (quoting 20 U.S.C. § 1412(a)(5)(A)).

IDEA "is frequently described as a model of 'cooperative federalism.'" *Schaffer*, 546 U.S. at 52 (internal quotation marks and citation omitted). "States [have] the primary responsibility for developing and executing educational programs for handicapped children." *Id.* (internal quotation marks omitted). In some jurisdictions special public schools for the disabled exist, with the result that placement of disabled children in private school at public expense is almost unheard of.[2] Other jurisdictions use a combination of public school and mutually-agreed private school placements to meet their IDEA obligations to disabled children.[3]

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[2] See Christopher J. Walker, Note, "*Adequate Access Or Equal Treatment: Looking Beyond The Idea To Section 504 In A Post-Schaffer Public School*," 58 STAN. L. REV. 1563, 1576 (2006) (describing Texas as an "ideal example of a state with fully inclusive state special schools, [whose] admission policies take into account . . . the IDEA's FAPE considerations. . . . In addition, these policies are not just lip service: what is written is also put into practice."). As a result, the number of private special education placements in Texas is miniscule. *See* Jay P. Greene & Marcus A. Winters, "Debunking a Special Education Myth," 2007 Education Next, Table 1 (Hoover Institution 2007) (only 198 IDEA private placements in Texas in 2003-04).

[3] *See* Walker, *supra*, 58 STAN. L. REV. at 1577-78 (discussing States that use combination of public and private placements for disabled children).

2. "The core of the statute . . . is the *cooperative process* that it establishes between parents and [public] schools." *Schaffer*, 546 U.S. at 53 (emphasis added). The individualized educational program, or IEP, is the vehicle for this cooperative process. A detailed blueprint tailored to the needs of the child, the IEP is "prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child." *Rowley*, 458 U.S. at 182. As this Court has noted, "[p]arents and guardians play a significant role in the IEP process" and parents are expressly "included as members of 'IEP teams.'" *Schaffer*, 546 U.S. at 53.

Public school officials and teachers are no less important than parents in formulating the IEP. As this Court recently affirmed, "IDEA relies heavily upon the expertise of school districts to meet its goals." *Id.* at 59; *see also id.* at 62-63 (Stevens, J., concurring) ("I believe that we should presume that public school officials are properly performing their difficult responsibilities under this important statute.").

While the statute requires that the child be provided with an "appropriate" education, this Court long ago made clear that IDEA does not contain "any substantive standard prescribing the level of education to be accorded handicapped children." *Rowley*, 458 U.S. at 189. "[T]he requirement that a State provide specialized education services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunity provided other [nondisabled] children'" in public school. *Id.* at 198. In other words, IDEA does not require States "to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children." *Id.* at 200.

3. IDEA provides for administrative and judicial review of an IEP in the event either the parent or the school district is dissatisfied, although virtually all challenges to IEPs are

initially brought by parents, *see Schaffer*, 546 U.S. at 53-54, who may recover attorney's fees if they prevail. *See id.* at 54 (citing 20 U.S.C. §1415(i)(3)(B)). As this Court noted less than two years ago, even the administrative review process is very costly; "[l]itigating a due process complaint is an expensive affair, costing schools approximately $8,000-to-$12,000 per hearing." *Id.* at 59. Consequently, Congress has "repeatedly amended the Act in order to reduce its administrative and litigation-related costs," *id.*, which divert limited resources away from the core purposes of the Act.

Parents who are dissatisfied with an IEP that does not include placement of the child in private school can unilaterally withdraw their child from public school, place the child in private school, and retroactively seek tuition reimbursement through litigation. *See Sch. Comm. of Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 367 (1985). They do so, however, "at their own financial risk," *Florence County*, 510 U.S. at 15, and "are entitled to reimbursement *only* if a federal court concludes both that the public school placement violated IDEA and that the private school placement was proper under the Act." *Id.* (internal quotation marks omitted). *See also Burlington*, 471 U.S. at 370; *Rowley*, 458 U.S. at 206. The cost of such protracted litigation necessarily means that the option of unilateral private placement will be available only for a small number of the many millions of disabled children throughout the United States.

SUMMARY OF ARGUMENT

The language of 20 U.S.C. § 1412(a)(10)(C)(ii), especially when read in its statutory context and in light of Congress' purposes in enacting and amending IDEA, clearly makes the previous receipt of "special education and related services under the authority of a public agency" a precondition for tuition reimbursement. To read the subsection's language to permit reimbursement to a parent who unilaterally places a

child in private school without having any intention of ever sending the child to public school would render the operative statutory language meaningless.

A. Congress' overarching intent in enacting and amending IDEA was to end the exclusion of disabled children from public school and to educate them in public schools with non-disabled children whenever possible. IDEA also addresses the needs of disabled children in private schools in two contexts: (1) children placed in, or referred to, private schools by public agencies; and (2) children unilaterally enrolled in private school by their parents. As to the latter, IDEA provides that such children will ordinarily have no individual right to special education and will receive only limited services from public agencies.

The standards set forth in IDEA for special education are thus directed principally at children educated in a public school or in private school pursuant to a recommendation by a public school. Subsection 1412(a)(10)(C)(ii) is a narrow exception to the general rule that public schools are the schools of first resort for disabled children and that unilateral parental placements are not publicly reimbursed. It was added to IDEA in 1997 following this Court's decisions upholding reimbursement in specified circumstances for unilateral private placements.

Congress took particular care in the 1997 amendments to protect the States' fisc. In § 1412(a)(10), Congress specifically limited public tuition reimbursement for unilateral private placements to cases in which the parent and child have gone through the IEP process, and the child has been educated in the public schools pursuant to the IEP. If those prerequisites are met, then a parent who believes that the public school is not providing an appropriate education can place the child in private school and seek reimbursement from the public school district.

B. This construction of the statute is supported by other language in subsection (C)(ii) and the limitations on reimbursement contained in subsection (C)(iii). Congress' use of the past tense throughout these subsections demonstrates that reimbursement is conditioned on the child's previous public placement. In addition, the substance of the limitations set forth in subsection (C)(iii) reinforces the conclusion that prior enrollment in public school is a precondition for tuition reimbursement. The statute expressly requires that an IEP meeting be held, an IEP be formulated, and parents give notice of their dissatisfaction with the IEP "prior to the removal of the child from the public school" and before acting upon their "intent to enroll their child in private school at public expense." 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa).

C. The fundamental purposes of IDEA will be subverted if parents who never sent, or intended to send, their child to public school can obtain tuition reimbursement through litigation. The core of the statute is the cooperative process that it establishes between parents and public schools. Cooperation is impossible if parents are determined from the outset to send their child to private school at public expense. Moreover, IDEA mandates that parents are members of their child's IEP team, a requirement that becomes counterproductive if parents go through the motions solely in order to lay the foundation for a later tuition reimbursement claim.

Equally important, the rule adopted by the court of appeals ignores Congress' express intent that disabled children be mainstreamed with children who are not disabled. The ruling below also defeats Congress' intent by diverting funds from the education of disabled children to the formulation of IEPs that will never be implemented—an indefensible waste of scarce public resources and special education expertise.

D. The court of appeals based its ruling in part on its view that a straightforward reading of the statute's text leads to absurd results. One asserted absurd result would disad-

vantage children whose disabilities are detected before they reach school age; the other would require parents to acquiesce in an inappropriate placement in order to preserve their right to seek reimbursement. Each of these concerns is illusory.

First, IDEA expressly contemplates the provision of special education services to preschool children. Children who have received such early-intervention services before reaching school age have "received special education and related services under the authority of a public agency" and can therefore seek tuition reimbursement as they approach elementary school age if they receive an inappropriate IEP before they start school.

The second absurd result rests on the premise of a flagrantly inadequate IEP, such that it is unreasonable to require the child to try out the public school plan even for a very short time. While that situation is imaginable, there is no reason to believe that it is other than exceedingly rare. The unstated premise of this asserted result is that public school special education specialists cannot be trusted, but this Court has held otherwise, repeatedly stating that IDEA relies heavily upon the expertise of public educators to meet its goals.

The absurd results posited by the court below are thus chimerical. There are many parents who plan to enroll their child in private school and later roll the dice on litigation to compel the public school to pay their child's tuition as well as their attorney's fees. This Court has already ruled that parents dissatisfied with the special education services set forth in an IEP may unilaterally place their child in private school and later seek reimbursement and fees. Under the express terms of IDEA, however, they may not do so unless their child has previously received special education under the authority of the public school.

ARGUMENT

SECTION 1412(a)(10)(C)(ii) MAKES PRIOR RECEIPT OF SPECIAL EDUCATION "UNDER THE AUTHORITY OF A PUBLIC AGENCY" A PRECONDITION FOR TUITION REIMBURSEMENT

The section of IDEA that governs "payment for education of children [unilaterally] enrolled in private school" provides:

> If [(1)] parents of a child with a disability, who [(2)] previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if [(3)] the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii) (bracketed numbers added). On its face, this language appears to embody essential, threshold requirements that must be satisfied before a claim may lie against a public agency for reimbursement by a parent of a child unilaterally placed in a private school.

The question presented in this case arises from particular language used in connection with the second element relating to the prior receipt of "special education and related services under the authority of a public agency." The statute's use of the language "who previously received" was seized upon by the court below as merely descriptive and not actually imposing an essential prerequisite for the award of reimbursement for the costs of private education. *See* J.A. 101.

As set forth in the following sections of this brief, the structure of the IDEA, the particular language used in

surrounding and related provisions, and the general policies behind the Act, lend unmistakable support to the conclusion that the "who have previously received" clause does, in fact, embody an express essential prerequisite to reimbursement for the costs of a private education. But even looking only at the single sentence quoted above, that result seems quite clear. For to read the provision otherwise, and permit reimbursement to parents who have unilaterally placed their child in private school without sending or having any intention of sending their child to public school, would mean that that clause simply has no meaning at all. This Court has long been reluctant to read statutes in a way that makes certain language "mere surplusage." *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) (a "statute should be interpreted so as not to render one part inoperative") (internal quotation marks omitted); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute") (internal quotation marks omitted).

A. Tuition Reimbursement for Private School Placements Made Without Consent of a Public Agency is a Narrow Exception to the General Rule of Non-Reimbursement for Unilateral Private Placements

IDEA expresses Congress' intent that disabled children receiving special education services under the Act be placed in public school, and mainstreamed with non-disabled children whenever possible. *See* pp. 2-3, *supra*. At the same time, Congress recognized that many disabled children attend non-public schools, some of whom are placed in such schools by a public agency and some unilaterally by their parents. 20 U.S.C. § 1412 (a)(10)(C). Consequently, IDEA contains a lengthy subsection that specifically governs the States' obligations to "Children in Private Schools." *Id.* §1412(a)(10). The statute draws a sharp line between children placed in or

referred to private schools by a public agency, where the agency assumes the cost, *id.* §1412(a)(10)(B),[4] and unilateral parental placements, where reimbursement is the rare exception, *id.* §1412(a)(10)(C)(ii).

Under these programs, "children enrolled in private school by their parents"—meaning unilaterally and without placement in or referral by public agencies—have no individual right to special education and generally receive only limited "services" from public school districts. *See* 20 U.S.C. § 1412(a)(10)(A). The intent of § 1412(a)(10) has been consistently articulated by the courts of appeals: IDEA does "not require a public school to make comparable provisions for a disabled student voluntarily attending private school as for disabled public school students." *K.R. v. Anderson Cmty. Sch. Corp.*, 125 F.3d 1017, 1018 (7th Cir. 1997).[5]

Subparagraph (A) delineates the general obligations of a State to disabled "children enrolled in private schools by their parents." *First*, each public agency must locate, identify, and evaluate all private school children residing in its district. 20 U.S.C. § 1412(a)(10)(A)(ii) (the "child-find requirement"); 34 C.F.R. § 300.451. *Second*, the public agency must create a "services plan" of special education and related services and

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[4] On placement of disabled children in private school by public agencies, *see, e.g., Z.W. v. Smith*, 20 F. App'x 282, 283 (4th Cir. 2006) (at IEP meeting public school district "confirmed that it did not have an appropriate public school placement for [child] and agreed to fund his education at a non-public day school"); *Yates v. Charles County Bd. of Ed.*, 212 F. Supp. 2d 470, 471 (D. Md. 2002) (under terms of IEP, public school district "agreed to place [child], at public expense, at the Kennedy Krieger School, a private institution").

[5] *See also Russman v. Bd. of Educ. of County of Watervliet*, 150 F.3d 219, 221 (2d Cir. 1998); *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 20 (1st Cir. 2004); *Cefalu ex rel. Cefalu v. E. Baton Rouge Parish Sch. Bd.*, 117 F.3d 231, 232-33 (5th Cir. 1997); *Foley v. Special Sch. Dist. of St. Louis County*, 153 F.3d 863, 865 (8th Cir. 1998).

reasonably accommodate students to participate in that plan. 20 U.S.C. § 1412(a)(10)(A)(i); 34 C.F.R. §§ 300.452, 300.455-56. *Third*, the agency must consult with private school representatives and parents in the development of the services plan. 20 U.S.C. § 1412(a)(10)(A)(iii); 34 C.F.R. § 300.454(b)-(c). *Fourth*, a private school official may submit a complaint regarding the state agency's consultation process, 20 U.S.C. § 1412(a)(10)(A)(v), and a parent may request a due process hearing to challenge a public agency's satisfaction of its "child find" obligations. 34 C.F.R. § 300.457(b).

Counterbalancing these entitlements are strict limitations on state obligations to unilaterally-placed children. Most significantly, States are required to provide to children voluntarily enrolled in private schools only those services that can be purchased with a proportionate amount of the federal funds that they receive under IDEA. 20 U.S.C. § 1412(a)(10)(A)(i)(I)-(II); 34 C.F.R. § 300.453. Consequently, private school children with disabilities have no "individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.454(a). Moreover, the public agency "shall make the final decisions with respect to the services plan to be provided to eligible private school children," while affording parents only an "opportunity to express their views," 34 C.F.R. § 300.454(b), rather than a due process hearing. *Id.* § 300.457(a).[6]

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[6] In contrast, a disabled child enrolled in public school has an individual right to special education and related services, ensured through the use of an IEP, 34 C.F.R. § 300.320; the public agency "must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate" in the formulation of the IEP, *id.* §§ 300.322, 300.501; and, if not satisfied, those parents have numerous "procedural safeguards," in-

Subsection (C) is the sole exception to the general rule of non-reimbursement for unilateral private placements without the prior approval of a public agency. It was added to IDEA in 1997, following this Court's decisions in *School Committee of Town of Burlington v. Department of Education*, 471 U.S. 359 (1985), and *Florence County School District Four v Carter*, 510 U.S. 7 (1993), which upheld reimbursement in certain circumstances for unilateral private placements of children who had previously been enrolled in public school. *See Burlington*, 471 U.S. at 361-62 (prior to being placed by his parents in private school, child attended "a public school in Burlington . . . under an IEP"); *Florence County*, 510 U.S. at 10 (prior to being placed by her parents in private school, child was "in a school operated by" the public school district, which formulated an IEP for her).

Mindful that federal funds then comprised only 6-8% of the amount needed to educate each State's disabled children, Br. *Amicus Curiae* of United States at 2, *K.R. v. Anderson Cmty. Sch. Corp.*, 521 U.S. 1114 (1997), Congress took care in the 1997 amendments to protect the States' fisc. "One specific purpose of the [1997] amendments was to control government expenditures for students voluntarily placed in private schools." *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 152 (1st Cir. 2004). It did so through the provisions of 20 U.S.C. § 1412(a)(10), with its narrowly-defined and limited provision allowing reimbursement for unilaterally-placed children only in certain instances.

A claim for tuition reimbursement for such children is thus a narrow exception to the general rule of non-reimbursement.[7] Strictly construing the exception to the general rule of

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cluding independent administrative and judicial review of the IEP. *Id.* §§ 003.500 *et seq.*

[7] *Compare* 20 U.S.C. § 1412(a)(10)(C)(i) (in general, IDEA "does not require a local educational agency to pay for the cost of . . . special education of a child with a disability at a private school . . . if that agency

non-reimbursement is the "'only . . . permissible meaning[] [of the provision that] produces a substantive effect that is compatible with the rest of the law.'" *Smith v. United States*, 508 U.S. 223, 233 (1993) (quoting *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)).

B. Other Language in Subsection (C) Supports the Conclusion That Prior Enrollment in Public School is a Precondition for Tuition Reimbursement

In addition to the provisions surrounding subsection (C), other language *within* that subsection also supports the conclusion that tuition reimbursement is available only to parents of a child with a disability who unilaterally enroll their child in private school after the child has "received special education and related services under the authority of a public agency."[8] *First*, Congress' use of the past tense throughout

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made a [FAPE] available to the child") *with id.* § 1412(a)(10)(C)(ii) (tuition reimbursement may be available for a child unilaterally enrolled in private school if the child "previously received special education . . . under the authority of a public agency . . . if the court or hearing officer finds that the agency had not made a [FAPE] available to the child in a timely manner prior to that enrollment").

[8] Although this Court has not construed the language "under the authority of a public agency," it has made clear that similar language in IDEA, "under public supervision and direction," does not encompass unilateral parental placements in private schools. *See Florence County*, 510 U.S. at 13 (quoting 20 U.S.C. § 1401(a)(18) (A)).

The statute defines "special education and related services" under 20 U.S.C. § 1412(a)(10)(C)(ii). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability," and includes instruction in the classroom, home, physical education, and other settings. *Id.* § 1401(29)(A) & (B). "Related services" include "transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services) . . . as may

the subsection demonstrates that reimbursement depends on the child's previous public placement. *See, e.g., United States v. Wilson*, 503 U.S. 329, 333 (1993) ("Congress' use of a verb tense is significant in construing statutes."); *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 59 (1987) (same); *Otte v. United States*, 419 U.S. 43, 49-50 (1974) (same). Subparagraph (C)(i) states that reimbursement is not available when the public agency

> *made* a free appropriate public education available to the child, and the parents *elected* to place the child in . . . [a] private school or facility.

20 U.S.C. § 1412(a)(10)(C)(i) (emphasis added). Similarly, subparagraph (C)(ii) makes reimbursement available when the public agency

> *had not made* a free appropriate public education available to the child in a timely manner *prior* to [their] enrollment [in a private school].

Id. § 1412(a)(10)(C)(ii) (emphasis added).

By using the operative verbs in the past and past perfect tenses, Congress indicated that the *existence* of the State's obligation to provide a FAPE—as well as its subsequent failure to do so—is a condition precedent to reimbursement for private school tuition. Because the State is not obligated to provide a FAPE to children in private schools, 20 U.S.C. § 1412(a)(10)(A); *Florence County*, 510 U.S. at 13-14, it necessarily follows that parents of children unilaterally enrolled in private school before they are entitled to a FAPE are not entitled to reimbursement.[9]

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be required to assist a child with a disability to benefit from special education . . . ." *Id.* § 1401(26)(A).

[9] The applicable regulations confirm this construction. The section dealing with private school reimbursement is entitled "Children With Disabilities Enrolled By Their Parents in Private School *When [A] FAPE*

Second, IDEA's "limitations" on reimbursement support this conclusion. While subparagraph (C)(ii) authorizes reimbursement for certain privately-placed children, the next subparagraph, clause (iii), states that "the cost of reimbursement described in clause (ii) may be reduced or denied . . . if":

> (I) . . . at the most recent *IEP meeting* that the parents attended *prior to removal of the child from the public school*, the parents *did not* inform the IEP team that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and *intent to enroll their child in a private school* at public expense; or . . . 10 business days . . . *prior to the removal of the child from the public school*, the parents did not give written notice to the public agency . . .; [or]
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> (II) . . . *prior to the parents' removal of the child from the public school*, the public agency informed the parents . . . of its intent to evaluate the child . . . , but the parents did not make the child available for such evaluation.

Section 1412(a)(10)(C)(iii)(I)-(II) (emphasis added). This limitation applies to all reimbursement claims "described in clause (ii)," and read together with that clause, reinforces the conclusion that prior enrollment in public school is a precondition for tuition reimbursement. Specifically, an IEP meeting must occur, and notice of parental discontent must be given, "*prior to removal of the child from public school*" and before the parents make good on their "*intent to enroll their*

Is At Issue." 34 C.F.R. § 300.403 (emphasis added). Because privately-placed students are not entitled to either an IEP or the FAPE which the IEP is designed to achieve, *see Florence County*, 510 U.S. at 13, these regulations support the view that a parent who enrolls the child in private school before a public agency determines that the child is entitled to special education is not entitled to tuition reimbursement.

child in private school." The upshot of this language leaves little room for debate: previous public school enrollment was viewed by Congress as a precondition for tuition reimbursement.

C. The Purposes of IDEA Will Be Subverted If Parents Who Do Not Send Their Child to Public School Can Obtain Tuition Reimbursement Solely Through Litigation

Under the holding below, parents of any disabled child who attends private school (and who never intended to send their child to public school) can go through the motions of cooperating with public school authorities on an "IEP team" and thereafter roll the dice on a tuition reimbursement claim by arguing that the IEP is "inappropriate." This rule of law discourages constructive involvement of private school parents in IEP formulation in a manner directly contrary to Congress' intent that "IDEA's promise of a 'free appropriate education' for disabled children would normally be met by . . . education in the regular public schools or in private schools chosen jointly by school officials and parents." *Florence County*, 510 U.S. at 12. Equally important, such a rule disregards Congress' express instruction that "'to the maximum extent appropriate' [States] must educate handicapped children 'with children who are not [handicapped].'" *Rowley*, 458 U.S. at 181 (quoting 20 U.S.C. § 1412(a)(5)(A)). This, too, is contrary to fundamental principles of statutory interpretation. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 97 (1993) (Where Congress has expressed a "general policy" in a "comprehensive scheme," and then qualified that policy with an exception, this Court "usually read[s] the exception narrowly in order to preserve the primary operation of the [policy].") (internal quotation marks omitted).

Unless reversed by this Court, the holding below will necessarily divert funds from the education of disabled children to the formulation of IEPs that will never be implemented and whose crafting will be followed by costly litigation to obtain tuition reimbursement and attorney's fees. All of this is directly contrary to Congress' unequivocal directive that "[t]eachers, schools, local education agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes" for disabled children. 20 U.S.C. § 1400(c)(9).

Before 1997, the federal government supplied States only six to eight percent of the funds needed for special education services for disabled students. Federal aid has subsequently increased to about 18%. *See* National School Boards Association, *IDEA Funding: Time for a New Approach* (March 2003). To be sure, by participating in the IDEA States incur an obligation to allocate a proportional share of that federal money to unilaterally-placed private school children with disabilities. *See* 20 U.S.C. § 1412(a)(10)(A). But encouraging litigation by parents who never intend to send their children to public school defeats the goal of "more equitable allocation of [IDEA] resources" recently called for by Congress. *See id.* § 1400(c)(7). It inevitably diverts finite special education resources away from public schools in order to pay for private school education that would otherwise be paid for by parents.

In States where the percentage of privately-placed children with disabilities has increased significantly over the past decade,[10] the increased cost of reimbursement claims is a

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[10] For example, the California Department of Education reports that private enrollment for students with disabilities has risen nearly five times faster than the overall increase in special education students. Since 1993, the number of students in public special education programs rose 27 percent, to 681,969 from 539,073, but special education students placed in private schools at public expense rose 128 percent, to 15,926 from 6,994.

major policy concern. "[T]he IDEA is not intended in all instances to further the broad goals identified by the [the Act] at the expense of fiscal considerations." *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2463 (2006).[11]

Further, and more specifically, affirmance of the judgment below would simply exempt parents who choose private school for their children at the outset from the express provisions of § 1412(A)(10)(C)(iii), which make cooperative interactions with school officials relevant to or dispositive of a reimbursement claim. Those provisions impose duties upon parents "prior to removal of the child from the public school" and before they "enroll their child in a private school." *Id. See Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1317-19 (11th Cir. 2003). Consequently, such parents could more easily seek tuition reimbursement than parents who follow the IDEA scheme in good faith. Gaming the system would be rewarded over working within the system to achieve IDEA's core goals of "normally" educating disabled children "in the regular public schools," *Florence County*, 510 U.S. at 12, and "to the maximum extent appropriate . . . with children who are not [disabled].'" *Rowley*, 458 U.S. at 181 (quoting 20 U.S.C. §1412(a)(5)(A)).

Nanette Asimov, *Extra-Special Education at Public Expense*, SAN FRANCISCO CHRON., Feb. 19, 2006, at A1.

[11] Tuition, attorney's fees, and other litigation costs are not the only public expenditures involved in tuition reimbursement cases. Preparing a detailed IEP for a disabled child involves numerous consultations and meetings, extensive testing and other public special education resources. *See* J.A. 19-25 (evidence submitted by petitioner Bd. of Ed. to IHO reviewing Gilbert F.'s IEP); *id.* at 42 (findings of fact by SRO) ("In preparation for annual review for the 1999-2000 school year, the CSE conducted several updated evaluations, obtained current progress reports from Gaynor and reviewed existing evaluation reports.").

Such a perverse reordering of priority for IDEA funds would favor disabled students from families who can afford a full-time private placement at the outset of IDEA eligibility to the detriment of less affluent ones who will likely begin their education in public school. *Cf. Schaffer*, 546 U.S. 49 (burden of proof in IEP challenge is on parents); *Arlington Central Sch. Dist.*, 126 S. Ct. at 2457 (expert fees non-reimbursable). Moreover,

> [o]nce some students obtain private placements, it is easier for others to do so. A network of parents and lawyers develops as private placements become more common, spreading information about options and strategies. So private placement may beget more private placement. If obtaining a private placement requires a battle with school officials, parents with greater awareness of their legal rights and greater resources to engage in the fight are more likely to win.

Greene & Winters, *supra*, 2007 Education Next at 4-5.[12] The decision of the court below fosters this trend, which is contrary to Congress' intent that disabled children have equal opportunities under the IDEA without regard to race or class. *See Rowley*, 458 U.S. at 194 n.18.

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[12] Anecdotal evidence of this trend is increasing. *See, e.g.*, Alison Leigh Cowan, *Amid Affluence, A Struggle Over Special Education*, N.Y. TIMES, Apr. 24, 2005; Julie Rawe, *Who Pays for Special Ed?*, TIME, Sept. 17, 2006; Yilu Zhao, *Rich Disabled Pupils Go To Private School at Public Expense*, N.Y. TIMES, Apr. 17, 2002; Nanette Asimov, *supra*, SAN FRANCISCO CHRON., at A1. Fifty percent of the approximately 1,240 yearly requests for tuition reimbursement in New York City Public Schools "were pursued by parents whose children have never attended nor plan to enroll in public school, but s[aw] the opportunity for their child's private education to be paid for at public expense." Testimony of Dr. Harold Levy, *Presidential Commission on Special Education, Assessment and Identification Task Force Hearing*, April 16, 2002.

D. Reading the Plain Language of § 1412(a)(10)(C)(ii) to Mean What It Says Does Not Lead to Absurd Results

The Second Circuit's construction of § 1412(a)(10) was based in part on its view that a straightforward reading of the statute's text leads to "absurd results." J.A. 105. The court therefore held that the "previous[] recei[pt] of special education and related services under the authority of a public agency," 20 U.S.C. § 1412(a)(10)(c)(ii), is not a precondition for tuition reimbursement because such a requirement would:

> prevent children who are provided with inadequate IEPs from receiving a free appropriate public education if their disabilities were detected before they reached school age, . . . [and] also place the parents of children with disabilities in the untenable position of acquiescing to an inappropriate placement in order to preserve their right to seek reimbursement from the public agency that devised the inappropriate placement.

J.A. 105. Contrary to the reasoning of the court of appeals, these concerns are illusory. IDEA provides ample opportunity for a child to receive "special education and related services" from public agencies without acquiescing to an "inappropriate placement."

At the early stages of a disabled child's education, IDEA specifically contemplates the provision of "special education and related services" to "toddlers with disabilities about to enter preschool," H.R. Rep. No. 105-95, at 92, *reprinted in* 1997 U.S.C.C.A.N. 78, 89, and "recognize[s] the importance of early intervention for infants . . . with disabilities from birth through age two." *Id.* at 115, 1997 U.S.C.C.A.N. at 113. To implement this objective, section 1419 of the Act "provides grants . . . to assist states to provide special education and related services" to these infants and toddlers, and sections 1431-44 set forth the "early intervention serv-

ices" that public agencies can provide, *id.* §§ 1431-44, often at "no cost." 20 U.S.C. § 1432(4)(B).[13]

Children who have received these early intervention services before reaching school age have "received special education and related services under the authority of a public agency" and can thus seek tuition reimbursement as they approach elementary school age if they are given an inappropriate IEP before entering school. Thus, parents can begin the IEP process in the months before their child's first school year; if an appropriate placement is not offered at this time, the parents can provide the requisite notice of "removal" before the school year begins, 20 U.S.C. § 1412(a)(10)(C)(iii)(I), "remove" their child from the public school by declining to have them attend,[14] and enroll them in private school while retaining a reimbursement claim, all without "acquiescing to an inappropriate placement." J.A. 105.

The second absurd result identified by the Second Circuit is that reading the statute to mean what it says places "the parents of children with disabilities in the untenable position of acquiescing to an inappropriate placement." *Id.* But this concern rests on the premise of a flagrantly inadequate IEP, such that it is unreasonable to require the child to try out the public school plan, even for a very short time. While that situation is imaginable, there is no reason to believe that it is other than exceedingly rare.

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[13] These sections of IDEA are in Subchapter III, "Infants and Toddlers with Disabilities."

[14] The only court to consider the meaning of "removal" in the statute concluded that "if the removal occurs during the school year, the [10-day notice period] count[s] back from the date of the intended actual physical removal." However, "[i]f the decision to enroll in private school occurs during a summer recess, the [notice period for removal] mark[s] from the beginning of the public school year" when the child fails to show up in class. *Sarah M. v. Weast*, 111 F. Supp. 2d 695, 701 (D. Md. 2000).

Indeed, the foregoing premise reflects contempt for the expertise of public school special education specialists that is directly contrary to this Court's teachings. As *Schaffer* made clear eight months before the court of appeals decided this case, this Court does not "assume that every IEP is invalid until the school district demonstrates that it is not. The Act does not support this conclusion. *IDEA relies heavily upon the expertise of school districts to meet its goals.*" 546 U.S. at 59 (emphasis added); *id.* at 62-63 (Stevens, J., concurring) (joining opinion of the Court "because I believe that we should presume that public school officials are properly performing their difficult responsibilities under this important statute"). *See also Rowley*, 458 U.S. at 206 (judicial review under IDEA "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review").

Finally, there will undoubtedly be cases in which a disabled child *might* receive an optimal education in an exclusive private school preferred by the parent but not included in the child's IEP by the public agency, although even this will often be debatable by special education experts. But as this Court held 25 years ago, IDEA "contains no requirement . . . that States maximize the potential of handicapped children 'commensurate with the opportunities provided to other children.'" *Rowley*, 458 U.S. at 189-90 (citation omitted).

> By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome."

Id. at 192 (quoting S. Rep. No. 94-168, at 11, *reprinted in* 1975 U.S.C.C.A.N. 1425, 1435).

It is thus apparent that the absurd results which influenced the court below are chimerical. Of course, there are parents who always intended to send their children to private school and would like to see if IDEA litigation can produce a judicial award of tuition reimbursement. This Court has already ruled in *Burlington* and *Florence County* that parents dissatisfied with special education services sought and provided by a public school may unilaterally place their child in a private school and later seek reimbursement and attorney's fees. *See Burlington,* 471 U.S. at 361; *Florence County*, 510 U.S. at 10-11. Under the express terms of the IDEA, however, they may not do so unless their child has previously received special education and related services under the authority of the public school.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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